

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

FRIENDS OF THE SAN JUANS, P.J.
TAGGARES COMPANY, COMMON SENSE
ALLIANCE, WILLIAM H. WRIGHT, AND SAN
JUAN BUILDERS ASSOCIATION,
Petitioners,

v.

SAN JUAN COUNTY,

Respondent.

Case No. 13-2-0012c

FINAL DECISION AND ORDER

I.

It was evident to the Board from the number of petitions filed, the many wide-ranging issues included in those challenges, and the starkly divergent points of view reflected by the challenges and argument, that San Juan County's Critical Areas Ordinance update process was a contentious and difficult one.¹

A jurisdiction's review and amendment of land-use regulations is a legislative, political process and the Board appreciates the difficulty faced by local legislative bodies in achieving Growth Management Act (GMA) compliance. Critical Areas regulations are clearly among the most difficult land-use regulations to understand, craft, and administer.

Having said that, the Board wishes to clarify for the parties and the residents of San Juan County that the role of the Growth Management Hearings Board is not to substitute its judgment for that of the San Juan County Council. Rather, the Board's role is to determine whether or not the County Council's actions comply with the goals and requirements of the GMA. Protection of critical areas can be accomplished in a myriad of ways. In determining

¹ The Board has departed from its usual practice to include a synopsis of its Final Decision and Order. In this matter, it has elected to provide a summary of its conclusions in Section VII below

1 whether or not the County's actions comply with GMA requirements to protect critical areas,
2 the Board is required to defer to the County's decisions unless, based on the entire record
3 presented to the Board, it concludes a particular regulation constitutes a "clearly erroneous"
4 violation of the GMA.

5 The burden to support a "clearly erroneous" finding lies with the challengers. If that
6 burden is not met, the Board is required to rule in favor of the County. Whether or not a
7 board member or the Board would have opted to protect critical areas in a different manner
8 is irrelevant. In this instance, the County Council chose to achieve critical area protection by
9 adopting Ordinances 26-2012, 27-2012, 28-2012 and 29-2012. This Final Decision and
10 Order constitutes a review of those ordinances for GMA compliance while granting
11 deference to the County's decisions and requiring the challengers to establish a regulation
12 was clearly erroneous.
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15 I. BACKGROUND

16 The following filed Petitions for Review (PFRs) on the dates indicated:

- 17 • Friends of the San Juans (the Friends) filed four PFRs on January 31, 2013;
- 18 • Common Sense Alliance (CSA) filed three PFRs on February 4, 2013;
- 19 • P.J. Taggares Company (Taggares) filed three PFRs on February 4, 2013;
- 20 • William H. Wright (Wright) filed a PFR on February 8, 2013;
- 21 • San Juan Builders Association (Builders) filed a PFR on February 11, 2013.

22 The four ordinances challenged in this matter represent the County's review and
23 update of its development regulations regarding critical areas. The ordinances include
24 general critical areas regulations (Ordinance 26-2012) and regulations addressing specific
25 types of critical areas:
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- 27 • Ordinance 27-2012: Geologically Hazardous Areas and Frequently Flooded
28 Areas;
- 29 • Ordinance 28-2012: Wetlands;
- 30 • Ordinance 29-2012: Fish & Wildlife Habitat Conservation Areas;
- 31
- 32

1 The Board conducted a Prehearing Conference in Anacortes, Washington on March
2 7, 2013, attended by all Board members and petitioners. The conference served to refine
3 issues and the schedules for briefing and oral argument.

4 Citizens Alliance for Property Rights Legal Fund filed a motion requesting
5 intervention which was denied by the Board by order dated March 29, 2013.
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7 Numerous motions to supplement the record were filed by the parties and addressed
8 by the Board by orders dated April 22, May 10, June 4, and June 19, 2013.

9 The Petitioners initial prehearing briefs were filed on April 26, 2013, with the
10 exception of that filed by San Juan Builders, which was filed on April 29, 2013. On May 17,
11 2013, San Juan County filed its response brief. Also, on that date, CSA, Taggares, and the
12 Friends filed briefs responding to issues raised by other petitioners which were adverse to
13 their positions. Thereafter, on May 31, 2013, the Builders, CSA, Taggares, and the Friends
14 filed reply briefs. Wright's reply brief was filed on June 3, 2013.
15

16 The Friends, Wright and Builders challenged all four critical areas ordinances while
17 CSA and Taggares only challenged Ordinance Nos. 26-2012, 28-2012, and 29-2012. All of
18 the PFRs (which had been assigned Case Nos. 13-2-0001 through 13-2-0012) were
19 consolidated under Case No. 13-2-0012c.

20 The hearing on the merits took place over three days, June 24-26, 2013, in Friday
21 Harbor, Washington. Board members William Roehl, Nina Carter, and Raymond Paoletta
22 attended with Roehl presiding. Kyle A. Loring represented the Friends while CSA/Taggares
23 was represented by Alexander W. Mackie. Wright appeared *pro se* while the Builders
24 appeared through its spokesperson, John B. Evans. San Juan County (the County) was
25 represented by Amy S. Vira.
26

27 The adoption of the challenged ordinances was the culmination of a process of
28 amending the County's CAO regulations, which began in 2006. According to the County, it
29 used a three-step process in which it first identified applicable Best Available Science
30 (BAS), then received recommendations for amendments to its existing regulations from
31 scientists, and finally considered and adopted the ordinances now before the Board. The
32

1 Petitioners raised a broad range of challenges, including inadequate public participation,
2 property rights, external inconsistency, failures to properly designate (including RCW
3 36.70A.480 challenges involving shorelines) and protect critical areas, failures to properly
4 include BAS, and State Environmental Policy Act (SEPA) violations.

5 The Friends' Issue Statements were numbered from 1 to 52 and addressed in that
6 order in the Prehearing Brief. Each of those numbered issues refers to a different
7 numbering system contained in the Prehearing Order. For example, the Friends' Issue 1 as
8 addressed in its Prehearing Brief is listed as Wetlands Issue 12 in the Prehearing Order. In
9 referring to their issues, the Board references both numbering systems.

10
11 CSA's and Taggares' issues were combined for purposes of briefing and argument
12 and are set out in three separate categories: those arising under Ordinance 26-2012, the
13 General Regulations Ordinance, are referred to as "General" issues and are numbered
14 General 1 through General 8. Similarly, issues challenging Ordinance 2008-2012, the
15 Wetlands Ordinance, are referenced as Wetlands Issue 1 through Wetlands Issue 8. Finally,
16 the FWHCAs issues are referred to as FWHCA Issue 1 through and including FWHCA 11.

17 18 19 **II. JURISDICTION**

20 The Board finds the Petitions for Review were timely filed pursuant to RCW
21 36.70A.290(2). The Board finds all Petitioners have standing to appear before the Board
22 pursuant to RCW 36.70A.280(2), with the exception of Petitioner Wright in regard to the
23 SEPA issues he has alleged. The Board finds it has jurisdiction over the subject matter of
24 the petitions pursuant to RCW 36.70A.280(1), with the exceptions addressed in the body of
25 this Final Decision and Order.
26

27 **III. PRESUMPTION OF VALIDITY, BURDEN OF PROOF, 28 AND STANDARD OF REVIEW**

29 Pursuant to RCW 36.70A.320(1), comprehensive plans and development regulations,
30 and amendments to them, are presumed valid upon adoption.² This presumption creates a
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32 ² RCW 36.70A.320(1) provides: [Except for the shoreline element of a comprehensive plan and applicable development regulations] "comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption."

1 high threshold for challengers as the burden is on the petitioners to demonstrate that any
2 action taken by the County is not in compliance with the GMA.³ The Board is charged with
3 adjudicating GMA compliance and, when necessary, invalidating noncompliant plans and
4 development regulations.⁴ The Growth Management Hearings Board is tasked by the
5 legislature with determining compliance with the GMA. The Supreme Court explained in
6 *Lewis County v. Western Washington Growth Management Hearings Board*:⁵
7

8 The Board is empowered to determine whether [county] decisions comply
9 with GMA requirements, to remand noncompliant ordinances to [the county],
10 and even to invalidate part or all of a comprehensive plan or development
11 regulation until it is brought into compliance.

12 The scope of the Board's review is limited to determining whether the County has
13 achieved compliance with the GMA only with respect to those issues presented in a timely
14 petition for review.⁶ The GMA directs that the Board, after full consideration of the petition,
15 shall determine whether there is compliance with the requirements of the GMA.⁷ In making
16 its determination, the Board shall consider the criteria adopted by the Department of
17 Commerce under RCW 36.70A.190.⁸ The Board shall find compliance unless it determines
18 the County's action is clearly erroneous in view of the entire record before the Board and in
19 light of the goals and requirements of the GMA.⁹ In order to find the County's action clearly
20 erroneous, the Board must be "left with the firm and definite conviction that a mistake has
21 been committed."¹⁰
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25 ³ RCW 36.70A.320(2) provides: [Except when city or county is subject to a Determination of Invalidity] "the
26 burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this
27 chapter is not in compliance with the requirements of this chapter."

28 ⁴ RCW 36.70A.280, RCW 36.70A.302.

29 ⁵ 157 Wn.2d 488 at 498, n. 7 (2006).

30 ⁶ RCW 36.70A.290(1).

31 ⁷ RCW 36.70A.320(3).

32 ⁸ Procedural criteria adopted by Commerce pursuant to RCW 36.70A.190(4)(b) are found at WAC 365-196.
Commerce has also adopted minimum guidelines pursuant to RCW 36.70A.050 for the classification of
agriculture, forest, and mineral lands and critical areas; these rules are found at WAC 365-190.

⁹ RCW 36.70A.320(3).

¹⁰ *City of Arlington v. CPSGMHB*, 162 Wn.2d 768, 778 (2008) (Citing *Dept. of Ecology v. PUD District No. 1 of Jefferson County*, 121 Wn.2d 179, 201 (1993); See also, *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board*, 161 Wn.2d 415, 423-24 (2007); *Lewis County v. WWGMHB*, 157 Wn.2d 488, 497-98 (2006).

1 In reviewing the planning decisions of cities and counties, the Board is instructed to
2 recognize “the broad range of discretion that may be exercised by counties and cities” and
3 to “grant deference to counties and cities in how they plan for growth.”¹¹ However, the
4 County’s actions are not boundless; its actions must be consistent with the goals and
5 requirements of the GMA.¹² As to the degree of deference to be granted under the clearly
6 erroneous standard, the Supreme Court has stated:

8 The amount [of deference] is neither unlimited nor does it approximate a
9 rubber stamp. It requires the Board to give the [jurisdiction’s] actions a
10 “critical review” and is a “more intense standard of review” than the arbitrary
11 and capricious standard.¹³

12 Thus, the burden is on the Petitioners to overcome the presumption of validity and
13 demonstrate that the challenged actions taken by San Juan County are clearly erroneous in
14 light of the goals and requirements of the GMA.

15 **IV. PRELIMINARY MATTERS, ABANDONED ISSUES** 16 **AND ORDER OF DISCUSSION**

17 The Friends, Wright, CSA and Taggares raise numerous challenges to Findings and
18 Background¹⁴ statements included in the challenged ordinances. The Board’s authority
19 allows it to review actions of the County related to the adoption of comprehensive plans,
20 development regulations, and amendments of same. In most instances recitals, or
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23 ¹¹ RCW 36.70A.3201 provides, in relevant part: “In recognition of the broad range of discretion that may be
24 exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the
25 boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements
26 and goals of this chapter. Local comprehensive plans and development regulations require counties and cities
27 to balance priorities and options for action in full consideration of local circumstances. The legislature finds that
28 while this chapter requires local planning to take place within a framework of state goals and requirements, the
29 ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and
30 implementing a county’s or city’s future rests with that community.”

31 ¹² *King County v. CPSGMHB*, 142 Wn.2d 543, 561 (2000) (Local discretion is bounded by the goals and
32 requirements of the GMA). See also, *Swinomish Indian Tribal Community v Western Washington Growth
Management Hearings Board*, 161 Wn.2d 415, 423 (2007)

¹³ *Swinomish Indian Tribal Community*, at 435, n.8.

¹⁴ Friends: General 1, General 2, GHA & FFA 1, Wetlands 1 and FWHCA 1;
CSA/Taggares: Ordinance 28-2012 – Wetlands Issues 1, 2 and 3 (CSA/Taggares abandoned Wetlands
Issue 1);

Ordinance 29-2012--- FWHCA Issues 1, 2, 3, 4, 5 and 6;

Wright: Ordinance 28-2012---Issues 1, 2 and 3.

1 “whereas” clauses, are employed to provide background information or to address the
2 purpose of an enactment.¹⁵ It is, however, the effect or results of the ordinances, in this
3 instance the controls the ordinances impose in relationship to the goals and policies of the
4 GMA, which lie within the jurisdictional purview of the Board.¹⁶

5 An example of one of these challenges is the Friends’ Ordinance 28-2012 Wetlands
6 Issue 1 which states:
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8 Does the finding that the BAS was included in developing the proposed
9 amendments and that they will protect wetlands in conformance with the
10 requirements of the GMA, at Background Section K.I., as well as the
11 findings at Background Sections: (1) K.II., (2) K.VII., (3) K.VIII., (4) K.IX., (5)
12 K.X., (6) K.XI.b., (7) K.XI.n, (8) K.XI.o, (9) K.XI.r., (10) K.XI.v., (11) K.XI.w.,
13 (12) K.XI.aa., (13) K.XII., (14) K.XII.a., (15) K.XII.c., (16) K.XII.d., (17)
14 K.XII.e., (18) K.XII.f., (19) K.XII.g., (20) K.XV., or (21) K.XVI. contravene
15 RCW 36.70A.020(9, 10), .040(3), .060(2, 3), .130(1), .170(1) and .172(1) by
16 undermining the designation and protection of critical areas, failing to
17 include the BAS, and frustrating the GMA goals to promote open space and
18 recreation and protect the environment?

19 Whether or not BAS was included in crafting the wetland CAO amendments and
20 whether those amendments will protect wetlands, as Background Section K.I states, is
21 indeed a valid issue to be raised and, in fact, the Friends raise that issue.¹⁷ But whether or
22 not the San Juan County Council in its adoption of Ordinance 28-2012 “finds” that it
23 included BAS, or “finds” the regulations will appropriately protect wetlands, is not controlling.

24 ¹⁵ *Local Ordinances for Washington Cities and Counties*, Municipal Research & Services Center of
25 Washington, May 2000, Report No. 50.

26 ¹⁶ See *Aberdeen Sav. & Loan Ass’n v. Chase*, 157 Wash. 351, 363: “The act itself, in §§ 3 and 4, contains a
27 recital that the tax is to be paid by each corporation liable thereto ‘for the privilege of exercising its corporate
28 franchise within this state.’ Such a legislative declaration is to be carefully considered by the courts and due
29 weight given thereto. **Courts should, however, in construing an act containing such a declaration,**
30 **consider the true operation and effect of the law which must be dealt with on the basis of the practical**
31 **results which follow its operation**, and not alone by legislative declarations contained therein.” (emphasis
32 added)

33 Although the Central Board’s decision in *Petso II* involved a public participation challenge, the Board’s
34 observations regarding findings are relevant: “The Board concludes that the findings in Edmonds Resolution
35 1185 simply clarified the ordinance ‘without changing its effect.’ Key findings sought to clarify the relationship
36 between the City’s aspirational goals and its level of service standards . . .” *Petso II v. City of Edmonds*, Case
37 No. 09-3-0005, (8/17/2009), FDO at 22. See also *Halmo v. Pierce County*, FDO, (9/28/2007) Case No. 07-3-
38 0004c at 26: “The proposed [finding] change . . . clarifies language of a proposed ordinance or resolution
39 without changing its effect.”

40 ¹⁷ See, e.g., Wetlands Issues 2 through 11, all of which allege violations of RCW 36.70A.172.

1 The Council could “find” that it complied with all public participation requirements even if the
2 record were to indicate there was no public notice or any public hearings. Similarly, the
3 Council could “find” it included BAS in accordance with RCW 36.70A.172 while the record
4 discloses a total lack of BAS consideration.

5 Another example is CSA/Taggares’ Ordinance 29-2012 – FWHCA Issue 1:

6 Issue 1: Whether the Background paragraph B on page 1 of Ordinance 29-
7 2012 is not consistent with the requirements of RCW 36.70A.060, .170, .172
8 and .480, and WAC 365-190-020, -030, -040, -080 and -130 by failing to
9 accurately describe or characterize FWHCAs through selective citation of
10 the regulations.

11 Background paragraph B to which that issue refers states as follows:

12 Fish and Wildlife Habitat Conservation Areas (FWHCAs) are described in
13 WAC 365-190-130. Some FWHCAs are located within areas subject to the
14 requirements of the Shoreline Management Act or SMA (RCW 90.58).
15 Although this update in (sic) undertaken pursuant to the GMA and is not a
16 Shoreline Master Program (SMP) amendment, as part of this required
17 update the County intends to address related protection requirements of the
18 Shoreline Management Act (SMA) including the requirement to protect
critical saltwater habitats defined in WAC 173-26-221.

19 The Board fails to understand how Background paragraph B could possibly violate
20 any of the statutes listed in Ordinance 29-2012 – FWHCA Issue 1. The paragraph merely
21 states indisputable facts and an intention. Further, the background statement is of no effect:
22 it does not constitute a development regulation.¹⁸ It is as it is described – background.

23 The Board will look to the actual effect of the ordinances and the record in
24 considering GMA compliance. The Board finds and concludes that Friends, Wright, CSA
25 and Taggares are unable to establish that the challenged Findings or Background
26 paragraphs violate the GMA. The issues which allege GMA violations of ordinance findings
27 or background paragraphs listed in Footnote 14 will be dismissed.
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32 ¹⁸ RCW 36.70A.030(7): “‘Development regulations’ or ‘regulation’ means the controls placed on development
or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas
ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision
ordinances, and binding site plan ordinances together with any amendments thereto. . . .”

1 The Friends, Wright, CSA and Taggares assert many of the challenged provisions
2 violate RCW 36.70A.040(3):

3 (3) Any county or city that is initially required to conform with all of the
4 requirements of this chapter under subsection (1) of this section shall take
5 actions under this chapter as follows: . . . (d) . . . if the county has a
6 population of less than fifty thousand, the county and each city located
7 within the county shall adopt a comprehensive plan under this chapter and
8 development regulations that are consistent with and implement the
comprehensive plan by January 1, 1995

9 RCW 36.70A.040(3) established the requirement that jurisdictions adopt initial
10 comprehensive plans and implementing development regulations.¹⁹ San Juan County
11 adopted the required comprehensive plan and development regulations many years ago.
12 The Board finds and concludes that Friends, Wright, CSA and Taggares are unable to
13 establish the ordinances violate RCW 36.70A.040(3). Allegations of violations of that statute
14 in all issues will be dismissed.²⁰

16 Although the Friends assert violations of RCW 36.70A.060(2) and (3)²¹ in all but six
17 of its fifty two issues, that statute is referenced but once in its Opening Brief.²² While the
18 Board appreciates the difficulties the parties may have had to surmount due to page
19

20 ¹⁹ *Peranzi v. City of Olympia*, Case No. 11-2-0011, FDO at 6: "Neither will the Board consider alleged
21 violations of RCW 36.70A.040(3). That statute specifically sets forth *initial* county and city requirements
22 following passage of the GMA over twenty years ago, including adoption of county-wide planning policies,
development regulations protecting natural resource lands, designation of urban growth areas, comprehensive
plans and implementing development regulations."

23 ²⁰ Ordinance 26-2012 (General) Friends Issues 2 through and including 13;
24 Ordinance 27-2012 (GHA/FFA) Friends Issues 2 through and including 5;
25 Ordinance 28-2012 (Wetlands) Friends Issues 2 through and including 12;
26 Ordinance 29-2012 (FWHCAs) Friends Issues 2 through and including 18;
27 Ordinance 26-2012 (General) CSA/Taggares Issues 1, 3, 6 and 7;
28 Ordinance 28-2012 (Wetlands) CSA/Taggares Issue 4;
29 Ordinance 29-2012 (FWHCAs) CSA/Taggares Issue 7;
30 Wright Issues 2, 3 and 6.

31 ²¹ (2) Each county and city shall adopt development regulations that protect critical areas that are required to
32 be designated under RCW. For counties and cities that are required or choose to plan under RCW
36.70A.040, such development regulations shall be adopted on or before September 1, 1991. For the
remainder of the counties and cities, such development regulations shall be adopted on or before March 1,
1992.

(3) Such counties and cities shall review these designations and development regulations when adopting
their comprehensive plans under RCW 36.70A.040 and implementing development regulations under RCW
36.70A.120 and may alter such designations and development regulations to insure consistency.

²² Petitioner Friends of the San Juans' Prehearing Brief, n. 62, p. 11.

1 limitations imposed on briefing, the failure to include that statute in its briefing is
2 troublesome. However, the Friends do devote substantial argument to its assertions that the
3 CAOs fail to protect critical areas. Allegations of violations of that statute will be addressed
4 in relationship to the issues arguing a lack of protection, failure to properly designate and to
5 include BAS.

6
7 Wright and CSA/Taggares also assert the challenged provisions violate RCW
8 36.70A.060(2) and (3). Wright raises that statutory violation in regard to two "Background"
9 sections which have been dismissed by the Board.²³ He also raises that challenge in Issue
10 6 which will be addressed below.

11 CSA/Taggares assert provisions of three of the ordinances (No. 26-2012, 28-2012
12 and 29-2012) are "arbitrary and discriminatory and otherwise fail to comply with the
13 requirements of RCW 36.70A.020(6), property rights, and the codified equivalent, RCW
14 82.02.020," that a failure to assure property rights are protected violates " . . . the governing
15 principles set forth at WAC 173-26-186(5)²⁴ . . ." and that the County failed to " . . . require
16 demonstration of nexus, proportionality and reasonable necessity . . . before the imposition
17 of environmental servitudes"²⁵

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20 ²³ Wright's Issues 2 and 3.

21 ²⁴ WAC 173-26-186(5): "The policy goals of the act, implemented by the planning policies of master programs,
22 may not be achievable by development regulation alone. Planning policies should be pursued through the
23 regulation of development of private property only to an extent that is consistent with all relevant constitutional
24 and other legal limitations (where applicable, statutory limitations such as those contained in chapter 82.02
25 RCW and RCW on the regulation of private property. Local government should use a process designed to
26 assure that proposed regulatory or administrative actions do not unconstitutionally infringe upon private
27 property rights. A process established for this purpose, related to the constitutional takings limitation, is set
28 forth in a publication entitled, *State of Washington, Attorney General's Recommended Process for Evaluation*
29 *of Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property*, first
30 published in February 1992. The attorney general is required to review and update this process on at least an
31 annual basis to maintain consistency with changes in case law by RCW 36.70A.370."

32 ²⁵ An example of the CSA/Taggares property rights allegations is General Issue 2: Whether the following terms
set forth in Section 2, SJCC 18.20.010 ("A" definitions) through Section 20, SJCC 18.20.230 ("W" Definitions)
in Ordinance 26-2012 are arbitrary and discriminatory and otherwise failed to comply with the requirements of
RCW 36.70A.020(6), property rights, and the codified equivalent, RCW 82.02.020:

As written the following definitions fail to meet the minimum standards for the proper application of
mitigating conditions to a private property as a universal condition and as such violate legally protected rights,
and are arbitrary and discriminatory and violative of procedural requirements established by the Courts in
Nollan v. California Coastal Comm., 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d. 677 (1987), *Dolan v. City of*
Tigard, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994), and *Isla Verde v. City of Camas*, 146 Wn.2d
740, 49 P.3d 867 (2002) and specifically including RCW 82.02.020. As the consequence of the County's

1 While the Board has jurisdiction to consider challenges based on RCW 36.70A.
2 020(6), [Goal 6], it lacks authority and jurisdiction over constitutional challenges.²⁶ By now
3 that should be well known and understood.²⁷ Yet another thorough analysis of that
4 jurisdictional lack is not warranted.²⁸

5 That conclusion also applies to the “nexus and proportionality” claims; those tests do
6 not appear in the GMA. Rather they originate in U.S. Supreme Court decisions considering
7 the takings clause. Alleging violations involving nexus and proportionality are requests for
8 the Board to consider constitutional claims. The requests will not be honored.
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12 failure, application of the provisions cause reasonable people (and courts) to guess at the meaning and proper
13 application in given circumstances; and are therefore unenforceable to protect critical areas as used in
14 combination with the wetland and fish and wildlife habitat conservation ordinance.

15 “Adaptive management”

16 “Buffer zone, strip, or area”

17 “Critical area functions and values”

18 “Development”

19 “Development area”

20 “No net loss”

21 “Primary association”

22 “Tree Protection Zone”

23 P.J. Taggares Company adopts the statements above as applied to the Taggares properties on Blakely
24 Island, including the Triplex, the Platted Lots facing the bay at the north end of the island, and the wooded but
25 developed peninsula at the north end of the island as described in the record.

26 Other issues raising similar challenges are: General Issue 4; Wetlands Issues 6 and 7; FWHCAs Issues
27 9 and 10.

28 ²⁶ RCW 36.70A.300(1): “The board shall issue a final order that shall be based exclusively on whether or not a
29 state agency, county, or city is in compliance with the requirements of this chapter, chapter 90.58 RCW as it
30 relates to adoption or amendment of shoreline master programs, or chapter 43.21C RCW as it relates to
31 adoption of plans, development regulations, and amendments thereto, under RCW 36.70A.040 or chapter
32 90.58 RCW.”

²⁷ Early on in this case, and on more than one occasion, the Board advised the parties that constitutional
challenges were beyond the jurisdiction of the GMHB and encouraged CSA/Taggares to discuss a possible
stipulation with the County so as to preserve any constitutional challenges for appeal if that was their concern.
No such stipulation was forthcoming.

²⁸ See, *Olympic Stewardship Found. v. W. Wash. Growth Mgmt. Hearings Bd.*, 166 Wn. App. 172, 196: “Upon
reconsideration, we note that the Board lacks the jurisdictional authority to decide claims alleging a violation of
property rights, including a violation of RCW 82.02.020.” The *Olympic Stewardship* Court then favorably cited
two Board decisions: *Citizens for Rational Shoreline Planning v. Whatcom County*, No. 08-2-0031, Order on
Dispositive Motion at 8-9 (finding GMHBs do not have jurisdiction to address issues related to chapter 82.02
RCW) as well as *WEAN v. Island County*, Case No. 06-2-0023, FDO at 8 (stating the growth boards normally
do not have jurisdiction to determine what property rights exist under Washington law).

See also, *Weyerhaeuser v. Thurston County*, GMHB Case No. 10-2-0020c, Amended Final Decision and
Order, at 56 (June 17, 2011).

1 Similar analysis applies to WAC 173-26-186(5) if these petitioners' references to this
2 DOE guideline are somehow intended to support a conclusion that the rule extends
3 jurisdiction to the Board over constitutional issues.

4 The Board finds and concludes it lacks the jurisdiction to address allegations of
5 violations of RCW 82.02.020, as well as related constitutional challenges, whether those
6 arise under the rubric of "nexus and proportionality" or WAC 173-26-186(5).²⁹
7

8 All such allegations shall be dismissed.³⁰ The Board considers the challenges based
9 on Goal 6, RCW 36.70A.020(6), below.

10 **Abandoned Issues**

11 WAC 242-03-590(1) provides in part "[f]ailure to brief an issue shall constitute
12 abandonment of the unbrieffed issue."³¹ The following issues, or parts thereof, are found to
13 have been abandoned, either as a result of the petitioner's acknowledgement of
14 abandonment or as a result of the Board's determination that the petitioner asserting that
15 issue failed to adequately brief same:
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17

18 ***CSA/Taggares:***

19 CSA/Taggares acknowledged they had abandoned the following:³²
20

- 21 • All words and phrases included in General Issues 1 and 2 other than "primary
22 association."
23
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25 ²⁹ *Pt. Roberts Registered Voters Assoc. v. Whatcom County*, WWGMHB Case No. 00-2-0052 at 4 (FDO, April
26 6, 2001) See also *Achen v. Clark County*, WWGMHB Case No. 95-2-0067 FDO (holding the Legislature did
27 not intend to protect unrecognized rights such as the right to subdivide or develop land for maximum personal
financial gain but rather those which are legally recognized by statute, constitution, or court decision).

28 ³⁰ The issues where such allegations are included are CSA/Taggares General Issues 2, and 4 regarding
29 Ordinance 26-2012; portions of Wetlands Issue 2, Wetlands Issues 3, 4, 6 and 7 regarding Ordinance 28-
2012; portions of FWHCA Issue 7, FWHCA Issues 9 and 10 regarding Ordinance 29-2012.

30 ³¹ An issue is briefed when legal argument is provided. It is not enough to simply cite the statutory provision in
31 the statement of the legal issue. *North Clover Creek II v. Pierce County*, Case No. 10-3-0015, Final Decision
32 and Order (May 18, 2011), at 11; An issue not addressed in petitioner's brief is considered abandoned. *WEC*
v. Whatcom County, Case No. 95-2-0071, FDO (December 20, 1995); When petitioners choose not to argue
an issue in their brief it is considered to be abandoned. *OEC v. Jefferson County*, Case No. 94-2-0017
FDO, (February 16, 1995).

³² List of Issues Adopted and Abandoned-CSA and Taggares, filed June 10, 2013.

- 1 • That portion of its argument regarding claims of Open Meeting Act violations in all
2 of its public participation issues.

- 3 • Wetlands Issue 1.

4 CSA/Taggares suggested some of their issues and the analysis of them could be
5 merged. The Board considered them individually.
6

7 ***Friends of the San Juans:***

8 The Board addresses the Friends' abandonment of issues within the body of this
9 order.
10

11 ***Wright:***

12 Petitioner Wright's Issue 6 is similar to CSA/Taggares' General Issue 1. The
13 significant difference was that Wright failed to list the specific words and phrases he
14 asserted were "vague and the subject of administrative discretion." Even assuming he
15 intended to include every definition contained in SJCC 18.20.010 through 18.20.230, he
16 failed to brief the issue and consequently the Board concludes the issue was abandoned.
17 The above described abandoned issues shall be dismissed.
18
19

20 **V. LEGAL ISSUES AND ANALYSIS**

21 **Public Participation - RCW 36.70A.035 and RCW 36.70A.140**

22 **Wright**

23 **Wright Issue 7:**

24 Whether the County failed to provide adequate provision for public
25 participation as provided in RCW 36.70A.035 and RCW 36.70A.140.

26
27 1. Whether the failure to conduct proceedings leading to the adoption of
28 the ordinance in accordance with the State's open public meetings statute is
29 inconsistent with the public participation requirements of RCW
30 36.70A.035(1)(2) and RCW 36.70A.140.

31 2. Whether the actions of the San Juan County Council in making
32 material changes to the Draft Critical Areas Ordinance sections after the

1 opportunity for public comment had closed is inconsistent with the public
2 notice requirements of RCW 36.70A.035(1)(2) and RCW 36.70A.140.

3 3. Whether the failure to conduct proceedings leading to the adoption of
4 the ordinance in accordance with the State's open public meetings statute is
5 inconsistent with the public participation requirements of San Juan County
6 Resolution 56-2006; most recently updated in Resolution 32-2011 dealing
7 with public participation and inconsistent with RCW 36.70A.140.

8 Wright's Issue 7 is virtually identical to the public participation issues raised by
9 CSA/Taggares: the latter's General Issue 8,³³ and FWHCAs Issue 8.³⁴ CSA/Taggares'
10 Wetlands Issue 5³⁵ is also similar, deleting only the third subsection of the other referenced
11 issues.³⁶

12
13
14 ³³ CSA/Taggares General Issue 8:

15 Whether the County failed to provide adequate provision for public participation as provided in RCW
16 36.70A.035 and RCW 36.70A.140.

17 1. Whether the failure to conduct proceedings leading to the adoption of the ordinance in accordance
18 with the State's open public meetings statute is inconsistent with the public participation requirements
19 of RCW 36.70A.035(1)(2) and RCW 36.70A.140.

20 2. Whether the actions of the San Juan County Council in making material changes to the Draft
21 Critical Areas Ordinance sections after the opportunity for public comment had closed is inconsistent
22 with the public notice requirements of RCW 36.70A.035(1)(2) and RCW 36.70A.140.

23 3. Whether the failure to conduct proceedings leading to the adoption of the ordinance in accordance
24 with the State's open public meetings statute is inconsistent with the public participation requirements
25 of San Juan County Resolution 56-2006; most recently updated in Resolution 32-2011 dealing with
26 public participation and inconsistent with RCW 36.70A.035(1)(2) and .140.

27 ³⁴ FWHCA Issue 8:

28 Whether the County failed to provide adequate provision for public participation as provided in RCW
29 36.70A.035 and RCW 36.70A.140.

30 1. Whether the failure to conduct proceedings leading to the adoption of the ordinance in accordance
31 with the State's open public meetings statute is inconsistent with the public participation requirements
32 of RCW 36.70A.035(1)(2) and RCW 36.70A.140.

2. Whether the actions of the San Juan County Council in making material changes to the Draft
Critical Areas Ordinance sections after the opportunity for public comment had closed is inconsistent
with the public notice requirements of RCW 36.70A.035(1)(2) and RCW 36.70A.140.

3. Whether the failure to conduct proceedings leading to the adoption of the ordinance in accordance
with the State's open public meetings statute is inconsistent with the public participation requirements
of San Juan County Resolution 56-2006; most recently updated in Resolution 32-2011 dealing with
public participation and inconsistent with RCW 36.70A.035(1)(2) and .140.

³⁵ Wetlands Issue 5:

Whether the County failed to provide adequate provision for public participation as provided in RCW
36.70A.035 and RCW 36.70A.140.

1. Whether the failure to conduct proceedings leading to the adoption of the ordinance in accordance
with the State's open public meetings statute is inconsistent with the public participation requirements
of RCW 36.70A.035(1)(2) and RCW 36.70A.140.

1 Both Wright and CSA/Taggares (as well as the Builders) include alleged violations of
2 RCW 36.70A.140. That statute requires jurisdictions to adopt a public participation
3 program.³⁷ There is no allegation or argument that the County has failed to adopt such a
4 program. In fact, both Wright and CSA/Taggares acknowledge in their issue statements that
5 the County has adopted such a program.³⁸ Allegations of violations of RCW 36.70A.140,
6 including those raised by the Builders, shall be dismissed.
7

8 Subsections 1 and 3 of both Wright's Issue and CSA/Taggares' General Issue 8 and
9 FWHCAs Issue 8 relate to supposed violations of the Open Public Meetings Act, chapter
10 42.30 RCW (OPMA).³⁹ First of all, the Board lacks jurisdiction to determine whether or not
11 an OPMA violation has occurred. The Board is, however, empowered to consider
12 challenges alleging violations of GMA public participation requirements. Having said that, it
13 is possible that facts sufficient for a court to determine an OPMA violation occurred could
14 similarly be sufficient to support proof of a GMA public participation violation or of a violation
15 of a jurisdiction's public participation plan. Conversely, the opposite is true as well. Any such
16 situations would be unique to the specific facts of a case.
17

18 In this matter, the essence of the public participation challenges regarding the OPMA
19 involves a committee dubbed by the County as the Critical Areas Ordinance Implementation
20

21 2. Whether the actions of the San Juan County Council in making material changes to the Draft
22 Critical Areas Ordinance sections after the opportunity for public comment had closed is inconsistent
23 with the public notice requirements of RCW 36.70A.035(1)(2) and RCW 36.70A.140.

24 ³⁶ Wright only referenced an alleged violation of RCW 36.70A.140. However, in that virtually the same issues
25 are raised by both Wright and CSA/Taggares, the Board will overlook that difference.

26 ³⁷ RCW 36.70A.140 "Each county and city that is required or chooses to plan under RCW 36.70A.040 shall
27 establish and broadly disseminate to the public a public participation program identifying procedures providing
28 for early and continuous public participation in the development and amendment of comprehensive land use
29 plans and development regulations implementing such plans. The procedures shall provide for broad
30 dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective
31 notice, provision for open discussion, communication programs, information services, and consideration of and
32 response to public comments. In enacting legislation in response to the board's decision pursuant to RCW
36.70A.300 declaring part or all of a comprehensive plan or development regulation invalid, the county or city
shall provide for public participation that is appropriate and effective under the circumstances presented by the
board's order. Errors in exact compliance with the established program and procedures shall not render the
comprehensive land use plan or development regulations invalid if the spirit of the program and procedures is
observed."

³⁸ See subparagraph (3) of Wright Issue 7 and CSA/Taggares General Issue 8.

³⁹ CSA/Taggares abandoned that portion of its argument regarding claims of Open Public Meetings Act
violations. See List of Issues Adopted and Abandoned, filed June 10, 2013, p. 4.

1 Team (Committee). The County acknowledges the existence of this Committee and further
2 acknowledges participation in its activities by the County Administration, planning staff, a
3 deputy prosecuting attorney, on occasion the County's BAS science consultants as well as
4 between one and three members of the six-person County Council. It appears the
5 Committee met beginning sometime in 2010 and continued until late April, 2012,
6 supposedly to coordinate scheduling of County Council consideration of the CAOs. The
7 Committee met without notice to the public and its meetings were not open to the public.
8 The County states the Committee was not formed by the County legislative body but rather
9 by the County administration. It also states the Committee was not empowered to act on
10 behalf of the County Council.⁴⁰

12 Petitioners Wright and CSA/Taggares allege that the Committee "worked out" the
13 details of the critical areas ordinances,⁴¹ that "the merits of the current County [CAO]
14 program" were developed by the Committee,⁴² and that the Committee "was created to
15 manage the development of a critical areas ordinance."⁴³

17 The Board finds CSA/Taggares submitted no evidence to support their allegations
18 that the Committee crafted the "merits" of the CAO program or Wright's allegations that the
19 Committee "took final action by reaching a consensus on and narrowing . . . data, policies,
20 materials, etc."⁴⁴ The Board finds these Petitioners' assertions are without support in the
21 record. It is apparent from the record, however, that the County provided an extraordinary
22 number of opportunities for the public to review and comment, in person, by teleconference
23 and in writing. It is also true these Petitioners took full advantage of that opportunity.⁴⁵

27 ⁴⁰ The Board was informed the Island County Superior Court, the Honorable Judge Alan R. Hancock, issued a
28 decision dated June 13, 2013, finding there was no issue of fact and that the County was entitled to judgment
29 as a matter of law dismissing a lawsuit alleging the Committee's work violated the OPMA. Cause No. 12-2-
05218-3.

30 ⁴¹ Petitioner Common Sense Alliance's Prehearing Brief at 8.

31 ⁴² *Id.* at 7.

32 ⁴³ Prehearing Brief of William H. Wright at 11.

⁴⁴ *Id.* at 13.

⁴⁵ A review of the Record supports the County's statement in its Prehearing Brief (p. 30) that counsel for
CSA/Taggares and Petitioner Wright submitted more than twenty written comments and appeared/spoke at
numerous Council meetings.

1 These issues also include an allegation the County amended some of the CAO
2 ordinances materially after the opportunity for public input ended in violation of RCW
3 36.70A.035(2). CSA/Taggares fails to address this allegation in their Opening Brief and
4 Wright merely repeats the assertion. Neither provides any facts to support the allegations.

5 Finally, RCW 36.70A.035(1) requires jurisdictions to include “procedures that are
6 reasonably calculated to provide notice to property owners and other affected and
7 interested individuals” There was no evidence submitted to establish a failure to
8 provide such notice beyond the allegations regarding the activities of the Committee.
9 Wright has failed to satisfy his burden of proof as to Issue 5 and CSA/Taggares have failed
10 to satisfy their burden of proof as to the following issues: General Issue 8, Wetlands Issue 5
11 and FWHCAs Issue 8.
12

13 **Builders**

14 The Builders’ public participation challenges arise from a different perspective.⁴⁶
15

16 **Builders Issue 1:**

17 Did San Juan County fail to provide the public with enough information
18 regarding how the Critical Areas Ordinances would affect the existing San
19 Juan County Comprehensive Plan including the island’s economy or
20 economic element, the Housing Element, and the Rural Element or
21 references to rural provisions, as required by: RCW 36.70A.035, RCW
22 36.70A.140, WAC 365.196.800(1), WAC 365.196.210(8)?

23 **Builders Issue 2:**

24 Did San Juan County fail to acknowledge and give a reasonably detailed
25 response to the public input it received and a detailed explanation of how
26 the new Critical Areas Ordinances are consistent with and harmonized with
27 the existing San Juan County Comprehensive Plan as required by: RCW
28 36.70A.140, RCW 36.70A.070, RCW 36.70.070(7), RCW 36.70.70.5a,
29 RCW 36.70.70A.020, WAC 365.196.800(1), WAC 365.196.210(8)?

30 **Builders Issue 3:**

31 Did the County fail to study or identify if or how the CAO would affect the
32 economy of San Juan County?

⁴⁶ The last iteration of the Builders’ issue statements was included in an amended Petition for Review filed March 15, 2013.

1 **Builders Issue 4:**

2 Did the County fail to consider the impacts of the Critical Areas ordinance
3 on the elements of our comprehensive plan that are essential to sustain our
4 rural quality of life?

5 A significant portion of the Builders' issues focus on the Comprehensive Plan
6 as does much its argument:⁴⁷

7 The County's failure to do a fundamental review and analysis of how the
8 new CAO would effect (sic) the remainder of the SJC Comprehensive Plan
9 is not present in the record."

10 [T]he Act ... requires a County (through the written record) to harmonize the
11 goals and meet the requirements of GMA.", quoting *Durland v. San Juan*
12 *County*, Case No. 00-2-0062c.

13 The County, for its part, maintained throughout the CAO review and
14 adoption process that any measures taken to provide protection for Critical
15 Areas were independent of any consideration for the effect those measures
16 would have on the existing Comprehensive Plan. The petitioners believe
17 that this is exactly wrong. . . .

18 Issue 2 is understood to allege an internal comprehensive plan inconsistency.
19 However, adoption of the development regulations (CAOs) did not amend the
20 Comprehensive Plan, but, as development regulations, they are intended to and are
21 required to implement the comprehensive plan. Issues 3 and 4 allege violations related to
22 RCW 36.70A.070(7) and RCW 36.70A.070(5)(a), both of which involve mandatory elements
23 of a comprehensive plan. RCW 36.70A.070(7) is the requirement to include an economic
24 development element while RCW 36.70A.070(5)(a) requires a rural element and, further,
25 requires a written record clarifying how a jurisdiction's rural element harmonizes the RCW
26 36.70A.020 planning goals.

27 As noted above, adoption of the CAOs constituted adoption of development
28 regulations. The Comprehensive Plan was not amended. Violations of RCW 36.70A.070
29 (preamble), RCW 36.70A.070(7) and RCW 36.70A.070(5)(a) cannot be established in this
30 matter.
31
32

⁴⁷ San Juan Builders Association Prehearing Brief at 4.

1 The Builders are unable to meet its burden of proof to establish GMA violations as to
2 Issues 2, 3 and 4.

3 Issue 1 asserts the County “fail[ed] to acknowledge and give a reasonably detailed
4 response to the public input it received.”⁴⁸ While jurisdictions must provide for open,
5 continuous public participation, there is no GMA requirement to actually provide a response
6 to each and every comment, letter or e-mail.⁴⁹ Rather, such input must be considered by the
7 decision makers and the decision makers have the discretion to give that input the weight
8 they deem appropriate.
9

10 The Builders have failed to meet its burden of proof to establish GMA violations as to
11 Issue 1.
12

13 **Consistency (External) - RCW 36.70A.130(1)(d)**

14 The following raise external consistency violations:

15 Friends Issues 1(Wetlands Issue 12) and 2 (FWHCA Issue 18);
16 Wright Issues 2-3;⁵⁰
17 CSA/Taggares General Issue 3; Wetlands Issue 4; FWHCA Issues 7 and 11.

18 All Petitioners, other than the Builders, asserted external consistency challenges
19 under RCW 36.70A.040 and/or RCW 36.70A.130 (issue statements alleging violations of
20 RCW 36.70A.040 which failed to include allegations of RCW 36.70A.130(1)(d) violations
21 have been dismissed). Furthermore, only Friends and CSA/Taggares briefed the external
22 consistency claims.
23

24 RCW 36.70A.130(1)(d) provides as follows:

25 Any amendment of or revision to a comprehensive land use plan shall
26 conform to this chapter. Any amendment of or revision to development
27 regulations shall be consistent with and implement the comprehensive plan.
28 (emphasis added)

29
30 ⁴⁸ *Id.* at 2.

31 ⁴⁹ The Board has previously explained that “consideration and response to public comment” does not require
32 that the government provide an answer to every question or concern raised by participants. *Petso v. City of Edmonds*, FDO(8/17/2009) at 17.

⁵⁰ Wright did not raise any inconsistency issues under RCW 36.70A.130. As addressed above, all alleged violations of RCW 36.70A.040 have been dismissed. Consequently, all consistency issues raised by Wright have been dismissed.

1 The following definitions assist in analyzing whether the CAO development
2 regulations rise to the level of a RCW 36.70A.130(1)(d) violation:

3 WAC 365-196-210(8): "Consistency" means that no feature of a plan or
4 regulation is incompatible with any other feature of a plan or regulation.
5 Consistency is indicative of a capacity for orderly integration or operation
6 with other elements in a system.

7 WAC 365-196-800(1): "Implement" in this context has a more affirmative
8 meaning than merely "consistent." See WAC 365-196-210. "Implement"
9 connotes not only a lack of conflict but also a sufficient scope to fully carry
10 out the goals, policies, standards and directions contained in the
11 comprehensive plan.

12 A lack of consistency between a comprehensive plan provision and a development
13 regulation constitutes a violation of the GMA when the development regulations preclude
14 attainment of planning goals and policies.⁵¹

15 In *Peranzi*, the Board phrased the appropriate questions as follows:

16 Do the development regulations implement the comprehensive plan goals
17 and policies?

18 Do any of the development regulation's features preclude achievement of
19 any of the Comprehensive Plan policies?

20 The related critical question is whether Petitioners have shown actual
21 conflict between . . . Comprehensive Plan policies and its new development
22 regulations or a failure of those development regulations to implement the
23 Plan.⁵²

23 Friends

24 Friends Issue 1 (Wetlands Issue 12):

25 Do the impacts that the Wetland Ordinance allows contravene the San Juan
26 County Comprehensive Plan goal to protect wetlands from net loss in
27 functions, values, and acreage, at Section 2.5.B.d., and violate Comp. Plan
28 wetland policies i., ii., iii., and vi., and/or Comp. Plan Section 2.5.B. Goals 1
29 and 2 for critical areas and Policies and Policies 1, 2, 8, and 9, and thus
30 contravene RCW 36.70A.040(3), .130(1)(d)?

31
32 ⁵¹ *Martin v. Whatcom County*, Case No. 11-2-0002, (FDO, August 31, 2011) p. 17, 20. See also *Heikkila/Cook*
v. City of Winlock, WWGMHB No. 09-2-0013c, FDO, p. 35.

⁵² *Peranzi v. City of Olympia*, Case No. 11-2-0011, May 4, 2012, FDO at 18.

Friends Issue 2 (FWHCA Issue 18):

Does the FWHCA Ordinance contravene the San Juan County Comprehensive Plan goals and policies for FWHCAs at Section 2.5.B.e., and/or Comp. Plan Section 2.5.B. Goals 1 and 2 for critical areas and Policies and Policies 1, 2, 8, and 9, and thus contravene RCW 36.70A.040(3), .130(1)(d)?

Friends assert violations of RCW 36.70A.130(1)(d) in forty-eight of its issues.⁵³ Its argument initially focuses on two of those issues, Wetlands 12 and FWHCA 18. It then states “The first two issues [Issue 1 (Wetlands 12) and Issue 2 (FWHCA 18)] below demonstrate the inconsistency of the CAO’s wetlands and FWHCA provisions with the San Juan County Comprehensive Plan . . . These arguments are hereby incorporated into every other issue⁵⁴ below that argues inconsistency with the Comp. Plan.”⁵⁵

Some of those issues challenge findings and background sections of the ordinances, including some issues which have been dismissed. Friends’ focus on the two referenced issues includes the following:

The Comp. Plan establishes CAO general goals to “[p]rotect the functions and values of CAs, giving special consideration to anadromous (migratory) fish,” and “[a]llow for use of property to the greatest extent possible while protecting Critical Area functions and values,”⁵⁶ and general CAO policies to: (1) “...establish regulations that protect critical areas based on consideration of the best available science”; (2) adopt policies and regulations designed to protect the functions and values of CAs; (3) implement applicable provisions of the adopted Salmon Recovery and Marine Area Stewardship Plan; and (4) monitor and enforce permit requirements and Best Management Practices designed to protect CAs.⁵⁷ In addition, the Comp. Plan establishes a wetland goal to “protect wetlands from a net loss in functions, values, and acreage,” and policies to: (1) designate, classify, and regulate wetlands based on wetland functions and

⁵³ RCW 36.70A.040 violations were listed in forty seven issues. All will be dismissed.

⁵⁴ Some of those issues challenge findings and background sections of the ordinances, issues which have been dismissed. Friends: General 1, General 2, GHA & FFA 1, Wetlands 1 and FWHCA 1; CSA/Taggares: Ordinance 28-2012--- A. Issue 1, B. Issue 2 and C. Issue 3; Ordinance 29-2012--- A. Issue 1, B. Issue 2, C. Issue 3, D. Issue 4, E. Issue 5 and F. Issue 6; Wright: Ordinance 28-2012--- B. Issue 2 and C. Issue 3.

⁵⁵ Petitioner Friends of the San Juans’ Prehearing Brief at 15.

⁵⁶ Comp. Plan § 2.5.B. Goal 1, Goal 2 (emphasis added).

⁵⁷ Comp. Plan § 2.5.B, Policies 1, 2, 8, 9 (respectively) (emphasis added).

1 values consistent with state guidelines; (2) establish standards for wetland
2 protection that include use limitations and buffers based on the classification
3 of the wetland and the potential impact of a proposed use on the wetland;
4 (3) establish a mitigation sequence that includes, in order of priority,
5 avoiding minimizing, or compensating for adverse impacts to wetlands and
6 buffers; and (4) establish methodologies that provide for compatible
7 agricultural uses of wetlands and their buffers.⁵⁸ (emphasis contained in
8 original)

9 Friends then assert there are numerous instances of inconsistencies between the
10 referenced Comprehensive Plan goals and policies and the adopted CAO development
11 regulations:

12 There is no accounting to ensure the retention of the current acreage of
13 wetlands in the County, and the mitigation provisions do not require
14 compensation with equivalent amount or quality of wetlands. The CAO does
15 not apply to: land beyond 205 feet from a wetland, development activities
16 that last less than two (2) years, land clearing, low sensitivity and medium
17 sensitivity wetlands up to 2,500 and 1,000 square feet (respectively), or
18 areas of existing development . . . It also establishes 8 general exemptions,
19 2 general exceptions, and 21 exemptions that allow activities in either or
20 both of wetlands and their buffers. In addition, Ecology confirmed that the
21 nominal habitat buffers, which can be reduced up to 63%, and the
22 inadequately-sized water quality buffers, which can be further reduced for
23 "green" roofs, in Urban Growth Areas, and for roads and trails, will impact
24 wetlands.

25 A difficulty with the blanket allegation of RCW 36.70A.130(1) violations (allegations
26 included in forty-eight issue statements) is the failure to tie each and every one of those
27 alleged development regulation inconsistencies to specific comprehensive plan goals/
28 policies. While the Board appreciates the fact it limited brief lengths, the Friends were aware
29 of the option to request by motion an exception to length limitations. With that having been
30 said, however, a careful review of briefing and oral argument fails to disclose instances
31 where the Friends establish a direct inconsistency between the adopted development
32 regulations contained in the CAO ordinances and Comprehensive Plan goals and policies.

⁵⁸ Comp. Plan § 2.5.B.d. Goal, Policies i., ii., iii. and vi. (emphasis added).

1 The County first observes it conducted a final review of the four ordinances for
2 comprehensive plan consistency.⁵⁹ It also argues that the Friends' incorporation of its
3 arguments on Issues 1 and 2 into its other issues was insufficient. In regard to Issue 1, the
4 County contends wetland replacement is reviewed on a project specific basis and that
5 replacement due to loss must be done in accordance with Department of Ecology
6 replacement ratios and guidance.⁶⁰ The County further observes its systems will include a
7 tracking method so that it will periodically implement mitigation projects to offset adverse
8 impacts.⁶¹ Finally, in regard to Issue 1, it states vegetation removal associated with
9 development will only be allowed under limited circumstances.⁶² As to Issue 2, the County
10 points out that Friends merely set forth the goals and policies, and then state they are
11 inconsistent without further explanation. Friends' specific allegation that the regulations do
12 not prohibit blockage of Type F streams (FWHCA Policy 5) is belied by SJCC 18.30.160
13 (E)(5)(b) which requires Type F crossings to be designed according to Washington
14 Department of Fish and Wildlife standards as well as related, listed guidance.⁶³

15
16
17 Establishing a development regulation's inconsistency with comprehensive plan
18 goals is a difficult hurdle to surmount. First of all, the GMA grants local jurisdictions broad
19 discretion and imposes a presumption of validity that comprehensive plans and
20 development regulations are valid on adoption. RCW 36.70A.320(1), RCW 36.70A.3201.⁶⁴
21 As previously noted, challengers must establish that the jurisdiction's legislative action is
22

23
24 ⁵⁹ See IR 075984-075997

25 ⁶⁰ See SJCC 18.30.110(F)(8).

26 ⁶¹ See Ordinance 26-2012, Background K. XI. IR04007.

27 ⁶² Respondent San Juan County's Prehearing Brief at 37.

28 ⁶³ The Board notes the referenced WDFW guidance was replaced on May 9, 2013, with a document entitled
29 *Water Crossing Design Guidelines*.

30 ⁶⁴ The legislature intends that the board applies a more deferential standard of review to actions of counties
31 and cities than the preponderance of the evidence standard provided for under existing law. In recognition of
32 the broad range of discretion that may be exercised by counties and cities consistent with the requirements of
this chapter, the legislature intends for the board to grant deference to counties and cities in how they plan for
growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and
development regulations require counties and cities to balance priorities and options for action in full
consideration of local circumstances. The legislature finds that while this chapter requires local planning to
take place within a framework of state goals and requirements, the ultimate burden and responsibility for
planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with
that community.

1 “clearly erroneous in view of the entire record before the board and in light of the goals and
2 policies of [the GMA].” RCW 36.70A.320(3). The Board’s determinations of RCW
3 36.70A.130(1)(d) inconsistencies in its recent decisions have found such violations when
4 there is a direct conflict between the comprehensive plan goal or policy and the adopted
5 development regulation. See by way of example the following: In *Peranzi*, a comprehensive
6 plan policy prohibited uses incompatible with industrial uses and the record established the
7 proposed residential use was incompatible.⁶⁵ Also, the *Martin* decision where
8 comprehensive plan policies discouraged development in areas prone to flooding, limited
9 uses in the 100 year floodplain to low intensity uses and discouraged rezones from one unit
10 per 10 acres to one unit per 5 acres. A development regulation doubling density within the
11 100 year floodplain was found to be inconsistent.⁶⁶

12
13 As the Board stated in *Leenstra*:

14
15 A finding of inconsistency requires a showing of actual conflict between
16 competing provisions of a city's planning policies and development
17 regulations. There is no inconsistency if it is possible for a particular
18 development to meet the requirements of both sets of policies or
19 regulations. Moreover, a city's planning goals cannot be examined in
isolation from one another. . . .⁶⁷

20 The Friends have failed to meet its burden of proof to establish any of the regulations
21 violate the consistency requirements of RCW 36.70A.130.

22 23 **Common Sense Alliance/Taggares:**

24 **General Issue 3:**

25 Whether the provisions in Section 21, SJCC 18.30.110(B) (Applicability), (D)
26 (Reasonable Use Exception), (F) (Critical Area Mitigation Requirements),
27 (G) (Existing legally established structures, uses, and activities), and (H)

28
29 ⁶⁵ *Peranzi v. City of Olympia*, No. 11-2-0011 FDO at 21, 22.

30 ⁶⁶ *C. Dean Martin v. Whatcom County* FDO 10/12/10 at 16, 17.

31 ⁶⁷ *Leenstra v. Whatcom County*, WWGMHB 03-2-0011, FDO at 15 (September 26, 2003). See also *Glen Cook*
32 and *Kathleen Heikkila v. City of Winlock*, Case No. 09-2-0013c, FDO at 35: “First of all, it would be
inappropriate to consider individual comprehensive plan goals in isolation from one another or to consider
individual development regulations without looking at all related comprehensive plan policies. While a specific
development regulation may not appear to foster fulfillment of a specific planning goal, it may clearly serve to
carry out a different comprehensive plan goal.”

(Nonconforming structures, uses, and activities) violate the consistency provisions of [RCW 36.70A.040(3)(d) and RCW 36.70A.130(1) (d)] and the critical area overlay sections of San Juan Comprehensive Plan section 2.5 and particularly 2.5(2)(3) in that the County failed to consider alternatives that could meet the statutory requirements with much less impact on the use of property and provided a one sided/not balanced approach to critical area regulations.

Wetlands Issue 4:

Whether Section 1, SJCC 18.30.150 and particularly subsections (A), (E) and (F) fail to comply with the requirements of RCW 36.70A.040, .060, .170, .172 and .480, and WAC 365-190-020, -030, -040, -080 and -090 and Chapter 365-195 WAC by

1. Failing to comply with State laws concerning consideration of and regulation of marine and lake shorelines;
2. Applying buffer schedules without regard to need or consequence;
3. Failing to consider alternatives more consistent with Section 2.5 of the Land Use Section of the San Juan County Comprehensive Plan;
4. Failing to include requirements imposed by court cases before the imposition of environmental servitudes to protect habitat;
5. Being internally inconsistent; and
6. Applying buffer requirement without support by best available science in that
 - a. The science identified did not support the application of buffers to the built environment.
 - b. The County Council failed to provide a mechanism to determine when the buffer science referenced was appropriate to the conditions and applicable to the circumstances under review and reasonably necessary.

FWHCAs Issue 7:

Whether Section 1, SJCC 18.30.160 and particularly subsections (A), (B), (C), (E), (F) and (G) fail to comply with the requirements of RCW 36.70A.020(6), .040, .060, .170, .172 and .480, and WAC 365-190-020, -030, -040, -080 and -130, and Chapter 365-195 WAC by

1. Failing to properly define FWHCAs;
2. Failing to comply with State laws concerning consideration of and regulation of marine and lake shorelines;
3. Applying buffer schedules without regard to need or consequence;
4. Adopting tree protection, water quality and geologic buffers inconsistent with Section 2.5 of the Land Use Section of the San Juan County Comprehensive Plan;

5. Failing to require demonstration of nexus proportionality and reasonable necessity with the burden of proof on the County before the imposition of environmental servitudes to protect habitat;
6. Being internally inconsistent; and
7. Applying buffer requirement without support by best available science in that the science identified did not support the efficacy of the buffer programs selected on lands characterized by the built environment.

FWHCAs Issue 11:

Whether the issues raised in connection with the CSA appeal of General Ordinance 26-2012 show it is inconsistent with the GMA as those sections apply to areas covered by Ordinance 29-2012 for the reasons stated in that appeal, which are incorporated herein by reference in its entirety.

In its argument on inconsistency, CSA focuses on two Comprehensive Plan Goals:

Critical Areas Goal 2: Allow for use of property to the greatest extent possible while protecting Critical Area functions and values.

Critical Areas Goal 3: Establish Critical Area requirements that are balanced and related to impacts.

It argues both the wetlands and FWHCA ordinances are “overly broad” and thus “interfere” with potential property uses. It states buffers are imposed “without regard to” property conditions, functions, impacts or the availability of alternative, “less costly and intrusive alternatives.”⁶⁸ Consequently, CSA/Taggares contends the CAO ordinances interfere with Critical Areas Goals 2 and 3.

The County argues CSA/Taggares has failed to show a direct conflict between provisions of the challenged ordinances and the cited Comprehensive Plan policies. Similarly, it states CSA/Taggares has failed to establish the CAO ordinances preclude achievement of the policies. Its position is that CSA merely takes the position the County could have achieved its objectives in a different manner, a manner more in line with the thinking of CSA/Taggares.

The Board agrees with the County’s argument that CSA/Taggares has failed to meet its burden to establish a violation of RCW 36.70A.130. Merely alleging a FWHCA regulation is overly broad in its application or that alternative methods would be “equally effective” is

⁶⁸ Petitioner Common Sense Alliance’s Prehearing Brief at 32.

1 insufficient to sustain its burden of proof. The further argument that wetland buffers have
2 been imposed without regard to necessity is refuted by analysis of the record and the
3 methodology established by the ordinances. See discussion of this argument elsewhere in
4 this Order.

5 Additionally, the Board is of the opinion that CSA has in fact abandoned many of the
6 issues alleging external inconsistency violations. General Issue 3 is interpreted as the only
7 one of CSA/Taggares' issues alleging a violation of RCW 36.70A.130, but it has failed to
8 relate how the specifically referenced sections preclude achievement of the two
9 Comprehensive Plan goals. At best, it has raised a valid observation that furtherance of the
10 two goals could have been achieved in a different manner. The County's choices for
11 comprehensive plan implementation are entitled to deference.

12 CSA/Taggares has failed to meet their burden of proof to establish violations of RCW
13 36.70A.130 in regard to Wetlands Issue 4 and FWHCAs Issues 7 and 11.

14 **Designation, Protection, BAS**

15 While the various petitioners have raised a variety of challenges, based on the
16 number of issues raised together with the attention focused in briefs and at oral argument,
17 the Board perceives the primary concerns of the petitioners involve the designation and
18 protection of the various types of critical areas and whether or not the County properly
19 included the Best Available Science. It is also abundantly clear that petitioners' allegations
20 arise from vastly different viewpoints. While CSA/Taggares and Wright firmly believe the
21 County in effect has established an overly complex, restrictive set of regulations, the Friends
22 take the position the County's CAOs fail to adequately protect critical areas.

23 Both Friends and CSA challenge the County's compliance with RCW 36.70A.060,
24 RCW 36.70A.170 and RCW 36.70A.172, the GMA mandates which include the
25 requirements to designate and protect critical areas and to do so while including best
26 available science (both in designating and protecting).

27 RCW 36.70A.060(2) provides, in part:
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29
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Each county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170.

RCW 36.70A.170 provides:

On or before September 1, 1991, each county, and each city, shall designate where appropriate: . . . (d) Critical areas.⁶⁹

Critical areas are defined by the GMA:

"Critical areas" include the following areas and ecosystems: (a) Wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas. "Fish and wildlife habitat conservation areas" does not include such artificial features or constructs as irrigation delivery systems, irrigation infrastructure, irrigation canals, or drainage ditches that lie within the boundaries of and are maintained by a port district or an irrigation district or company. RCW 36.70A.030(5)

RCW 36.70A.172(1) states:

In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas. In addition, counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.

Although the GMA neither defines BAS nor what is intended by the phrase "include the best available science" in crafting regulations to protect the designated critical areas, the Board's interpretations and methods of analysis have been approved by the Washington Supreme Court.⁷⁰

In 1996, the Western Washington Growth Management Hearings Board recognized that the legislature had not defined BAS and, therefore, sought to determine for itself the scope and meaning of the term. *Clark County Natural Res. Council v. Clark County*, No. 96-2-0017, 1996 WL 716195, at *5, 1996 GMHB LEXIS 413 (W. Wash. Growth Mgmt. Hr'gs Bd. Dec. 6, 1996). There, the Board recognized that local governments still had discretion in making decisions within the structure of RCW 36.70A.172 and refused to establish a bright-line definition of BAS. *Id.* Instead, it held that it

⁶⁹ *Ferry County v. Concerned Friends*, 155 Wn.2d 824, 832: "The GMA directs counties and cities to designate critical areas. RCW 36.70A.170."

⁷⁰ *Id.* at 834.

1 would consider claims regarding BAS on an individual basis with these
2 factors in mind:
3 "(1) The scientific evidence contained in the record; (2) Whether the
4 analysis by the local decision-maker of the scientific evidence and other
5 factors involved a reasoned process; and (3) Whether the decision made by
6 the local government was within the parameters of the Act as directed by
7 the provisions of RCW 36.70A.172(1)."⁷¹

8 The Supreme Court has also stated [in referring to the statutory mandate to grant
9 deference]:

10 . . . the requirements to be guided by the "best available science" (BAS) in
11 developing critical areas regulations and to "give special consideration" to
12 protecting anadromous fisheries arguably conflict with the legislature's
13 directive that growth management hearings boards defer to local balancing
14 of "local circumstances," if that local balancing is not in favor of critical
15 areas.⁷²

16 Further complicating analysis is the fact jurisdictions may depart from the
17 recommendations of BAS:

18 Moreover, the GMA does not require the county to follow BAS; rather, it is
19 required to "include" BAS in its record. RCW 36.70A.172(1). Thus, the
20 county may depart from BAS if it provides a reasoned justification for such a
21 departure.⁷³

22 It is also true that when balancing those goals [the goals set forth in RCW
23 36.70A.020] in the process of adopting a plan or development regulation
24 under GMA, a local jurisdiction must *consider* BAS regarding protection of
25 critical areas. This does not mean that the local government is required to
26 adopt regulations that are consistent with BAS because such a rule would
27 interfere with the local agency's ability to consider the other goals of GMA
28 and adopt an appropriate balance between all the GMA goals. However, if a
29 local government elects to adopt a critical area requirement that is outside
30 the range that BAS alone would support, the local agency must provide
31 findings explaining the reasons for its departure from BAS and identifying
32

⁷¹ See also the Supreme Court's positive reference in *Ferry County*, at p. 835, to the Board's decision in *Easy v. Spokane County*, Case No. 96-1-0016 (1997, FDO).

⁷² *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board*, 161 Wn.2d 415, 426.

⁷³ *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board*, 161 Wn.2d 415, 430.

1 the other goals of GMA which it is implementing by making such a choice.⁷⁴
2 (emphasis added)

3 The WACs provide some additional clarity to the concepts of critical area protection
4 and designation.

5 WAC 365-190-040(5), in part provides:

6 Designation is the second step in implementing RCW 36.70A.170.

7 (a) Pursuant to RCW 36.70A.170 . . . critical areas must be designated
8 based on their defined classifications. For planning purposes, designation
9 establishes:

10 (i) The classification scheme;

11 . . .

12 (iii) The general distribution, location, and extent of critical areas.

13 (b) . . . In circumstances where critical areas cannot be readily identified,
14 these areas should be designated by performance standards or definitions,
15 so they can be specifically identified during the processing of a permit or
16 development authorization.

17 (c) Designation means, at a minimum, formal adoption of a policy statement,
18 and may include further legislative action. Designating inventoried lands for
19 comprehensive planning and policy definition may be less precise than
20 subsequent regulation of specific parcels for conservation and protection. . . .

21 WAC 365-196-830(3) defines protection as it relates to critical areas:

22 "Protection" in this context means preservation of the functions and values
23 of the natural environment, or to safeguard the public from hazards to health
24 and safety.

25 WAC 365-195-915 addresses the inclusion of BAS:

26 (1) To demonstrate that the best available science has been included in the
27 development of critical areas policies and regulations, counties and cities
28 should address each of the following on the record:

29 (a) The specific policies and development regulations adopted to protect the
30 functions and values of the critical areas at issue.

31 (b) The relevant sources of best available scientific information included in
32 the decision-making.

(c) Any nonscientific information—including legal, social, cultural, economic,
and political information—used as a basis for critical area policies and
regulations that depart from recommendations derived from the best

⁷⁴ *Whidbey Env'tl. Action v. Island County*, 122 Wn. App. 156, 173.

1 available science. A county or city departing from science-based
2 recommendations should:

3 (i) Identify the information in the record that supports its decision to depart
4 from science-based recommendations;

5 (ii) Explain its rationale for departing from science-based recommendations;
6 and

7 (iii) Identify potential risks to the functions and values of the critical area or
8 areas at issue and any additional measures chosen to limit such risks. State
9 Environmental Policy Act (SEPA) review often provides an opportunity to
10 establish and publish the record of this assessment.

11 Friends challenge the County's designation and protection of critical areas and
12 consideration of BAS in dozens of its issues. CSA/Taggares also raises similar challenges
13 in numerous issues. Due to the different focus of each of these petitioners, specific
14 discussion and analysis of these petitioners' issues will be separated.

15 **Friends:**

16 Friends' issues asserting designation, protection and BAS challenges will be
17 addressed in the same order presented in its Prehearing Brief, with limited exceptions.

18
19 **Issue 8 (General 3):**

20 Do the definitions for "development," "development areas," "impervious
21 surface," "new and expanding agricultural activities," "no net loss," and
22 "primary association," at Section 5, SJCC 18.20.040, Section 9, SJCC
23 18.20.090, Section 13, SJCC 18.20.140, and Section 14, SJCC 18.20.160,
24 contravene RCW 36.70A.020(9, 10), .040(3), .060(2, 3), .130(1), .170(1)
25 and .172(1) because they do not require full designation and protection of
26 critical areas, do not include the BAS, and frustrate the GMA goals to
27 promote open space and recreation and protect the environment?

28 Friends' argument in support of this issue fails to address the question of designation.
29 Rather, it focuses on protection of critical areas and further alleges the definitions
30 "contravene" BAS.

31 The Friends argue the "development" definition is not compliant with the GMA
32 requirements as the term "clearing" was removed from the County's prior definition and the

1 definition excludes activities of a duration of less than two years.⁷⁵

2 The Board observes “vegetation removal” is covered by the Ordinance.⁷⁶ While the
3 definition of “development” would be clearer if it had specifically included “clearing,” the
4 Board does not find the definition results in a GMA violation. “Vegetation removal” is broad
5 enough to include clearing. The Board also notes that the two-year duration exemption for
6 “activities with a duration of less than twenty-four months” is qualified by the clause “that do
7 not adversely alter critical areas”.⁷⁷ However, the Board finds the County failed to include
8 any standards to ascertain the actual duration of such activities or to address the potential
9 impacts on critical areas.
10

11 The Board finds and concludes the definition of “development” fails to protect critical
12 areas in violation of RCW 36.70A.060 and RCW 36.70A.172 for those reasons.

13 The Friends also take issue with the definitions of the following terms: “development
14 areas”, “impervious surface”, “new and expanding agricultural activities.”, “no net loss”, and
15 “primary association” but devote only one sentence to each. However, the Board does note
16 that many of those terms are addressed in conjunction with other issues raised by the
17 Friends and the Board will consider those challenges below. The Board finds the Friends
18 have failed to meet their burden of proof to establish GMA violations based on those
19 definitions.
20

21 **Issue 9 (General 5):**

22 Does the Reasonable Use Exception set forth at SJCC 18.30.110.D.
23 contravene RCW 36.70A.020(9, 10), .040(3), .060(2, 3), .130(1), and
24 .172(1) and Comp. Plan §§ 2.5.B. Goal 1 and Policies 1, 2, 8, 9, and
25 2.5.B.a.-d. because it allows unmitigated impacts and substantial,
26 unmitigable impacts that will not protect CAs, does not include the BAS, is
27 inconsistent with the Comp. Plan, and frustrates the GMA goals to promote
28 open space and recreation and protect the environment?
29
30

31 ⁷⁵ IR 40021.

32 ⁷⁶ SJCC 18.30.110(B), IR 40044: “These overlay districts provide regulations for land use, development and
vegetation removal in critical areas and areas adjacent to critical areas as established in SJCC 18.30.120-160.”

⁷⁷ SJCC 18.20.040(D).

1 Issue 9 is a challenge to the reasonable use exception which was included to prevent
2 denial of use of the property. The Friends argue the two options granted to a property owner
3 impacted by the critical areas ordinances are “unprotective,” that the County should have
4 required the application of a conditional use permit (CUP) to provide a more public process
5 and established a system to evaluate cumulative impacts.

6 The County argues this issue was abandoned as the Friends’ argument fails to relate
7 its observation to any GMA violations.

8 The Board agrees with the County that the Friends argument consists of mere
9 assertions and that it did not relate those assertions to specific results that would rise to the
10 level of a GMA violation.

11 The Board finds the Friends have failed to meet their burden of proof to establish GMA
12 violations as to Issue 9. The Reasonable Use Exception is also addressed in regard to other
13 issues.
14

15
16 **Issue 10 (General 6):**

17 Does the public agency and public/private utility exception at SJCC
18 18.30.110.E contravene RCW 36.70A.020(9, 10), .040(3), .060(2, 3),
19 .130(1), and .172(1) and Comp. Plan §§ 2.5.B. Goal 1 and Policies 1, 2, 8,
20 9, and 2.5.B.a.-d. because it will not protect CAs, does not include the BAS,
21 is inconsistent with the Comp. Plan, and frustrates the GMA goals to
22 promote open space and recreation and protect the environment?

23 The County included an exception from the CAO’s for public agencies and
24 public/private utilities (SJCC 18.30.110E) which the Friends assert allows avoidance of the
25 CAO when such an entity “has difficulty” meeting protection regulations.

26 The County takes the position that the exception is supported by the required
27 “reasoned analysis” for departure from BAS and that the ordinance includes detailed
28 information and mitigation plans.

29 The clause “would preclude a development proposal” does not include a qualifier that
30 places the initial burden on the agency to show the location of the proposed development is
31 necessary. The Board agrees with the Friends’ argument that the initial determination under
32

1 the County's system, the location of the "development proposal" is left solely to the
2 proponent, notwithstanding the possibility the proposal could be located in an area with
3 fewer negative impacts to a critical area. The County has the obligation to protect critical
4 areas and leaving the choice of location to the proponent is in effect a delegation of
5 authority, would abrogate the duty to protect critical areas and fails to assure no net loss of
6 ecological functions. Furthermore, there are no standards by which to determine that a
7 project proponent would "have difficulty" meeting standard critical area regulations.⁷⁸
8

9 The Board finds and concludes the Friends have met their burden of proof to establish a
10 violation of RCW 36.70A.060. The Board further finds and concludes the County's actions
11 were not guided by Goal 10.⁷⁹ The public/private utility exemption is also addressed in
12 regard to other issues.
13

14 **Issue 11 (General 7):**

15 Do the mitigation provisions at SJCC 18.30.110.F. contravene RCW
16 36.70A.020(9, 10), .040(3), .060(2, 3), .130(1), and .172(1) and Comp. Plan
17 §§ 2.5.B. Goal 1 and Policies 1, 2, 8, 9, and 2.5.B.a.-d. because they will not
18 protect CAs, do not include the BAS, are inconsistent with the Comp. Plan,
19 and frustrate the GMA goals to promote open space and recreation and
20 protect the environment?

21 The Friends suggest the CAO's rely on "compensatory mitigation" when mitigation
22 has historically been shown to be inadequate. The County states the Friends' argument is
23 conclusory and merely expresses its belief that the County could have done things
24 differently.
25

26 While mitigation has not always been shown to be effective, the County's first focus
27 in its CAO's is avoidance. Mitigation of impacts is an accepted practice; it is one of the steps
28 included in "mitigation sequencing."
29

30
31 ⁷⁸ SJCC 18.30.110E includes the sentence providing for this exemption: "The following provisions are
32 available to public agencies and utilities that have difficulty meeting standard critical area requirements."
(emphasis added)

⁷⁹ RCW 36.70A.020(10) Environment. "Protect the environment and enhance the state's high quality of life,
including air and water quality, and the availability of water."

1 Wetland mitigation is usually implemented as a sequence of steps or
2 actions (i.e., mitigation sequencing). Compensatory mitigation is the step in
3 the mitigation sequence that occurs after avoidance and minimization. It
4 involves restoring (re-establishing, rehabilitating), creating (establishing),
5 enhancing, or preserving wetlands to replace those lost or degraded
6 through permitted activities.⁸⁰

7 Mitigation sequencing is addressed in the WACs adopted by the DOE at the direction
8 of the legislature:

9 The Washington State Environmental Policy Act (SEPA) (Chapter 43-21C
10 RCW), administered by Ecology, and Section 404 of the federal Clean Water
11 Act (CWA), administered by the Corps and EPA, both require that a
12 sequence of actions be taken for proposals that will impact wetlands
13 (mitigation sequence). The following are the steps in the mitigation
14 sequence according to the implementing rules of SEPA (Chapter 197-11-
15 768 WAC):

16 (1) Avoiding the impact altogether by not taking a certain action or parts
17 of an action;

18 (2) Minimizing impacts by limiting the degree or magnitude of the action
19 and its implementation, by using appropriate technology, or by taking
20 affirmative steps to avoid or reduce impacts;

21 (3) Rectifying the impact by repairing, rehabilitating, or restoring the
22 affected environment;

23 (4) Reducing or eliminating the impact over time by preservation and
24 maintenance operations during the life of the action;

25 (5) Compensating for the impact by replacing, enhancing, or providing
26 substitute resources or environments; and/or

27 (6) Monitoring the impact and taking appropriate corrective measures.⁸¹

28 The Board finds the Friends have failed to meet their burden of proof to establish GMA
29 violations as to Issue 11.

30 **Issue 12 (General 10):**

31 Does the elimination of factors such as the intensity, severity, and
32 cumulative impacts of a proposal, as well as the suitability of the mitigation,

⁸⁰ Washington State Department of Ecology, U.S. Army Corps of Engineers Seattle District, and U.S. Environmental Protection Agency Region 10. March 2006. *Wetland Mitigation in Washington State – Part 1: Agency Policies and Guidance (Version 1)*. Washington State Department of Ecology Publication #06-06-011a. Olympia, WA., p. ix.

⁸¹ *Id.* at 22.

1 from the decision whether to process the application as a conditional use
2 permit or provisional use permit, at SJCC 18.80.090.D, contravene RCW
3 36.70A.020(9, 10), .040(3), .060(2, 3), .130(1), and .172(1) and Comp. Plan
4 § 2.5.B. Goal 1 and Policies 1, 2, 8, 9 because it will not protect CAs, does
5 not include the BAS, is inconsistent with the Comp. Plan, and frustrates the
6 GMA goals to promote open space and recreation and protect the
7 environment?

8 **Issue 13 (Wetlands 7):**

9 Does the processing of activities in wetlands and their buffers as a PUP, at
10 SJCC 18.30.150.E.3, Table 3.8.v., contravene RCW 36.70A.020(9, 10),
11 .040(3), .060(2, 3), .130(1), and .172(1), by establishing a process that
12 could permit development activities in wetlands and their buffers without
13 adequate review for impacts to CAs?

14 **Issue 14 (FWHCA 8):**

15 Does the processing of "[o]ther uses" in FWHCAs and their water quality
16 buffers as a PUP, at SJCC 18.30.160.E.2, Table 3.10.x., contravene RCW
17 36.70A.020(9, 10), .040(3), .060(2, 3), .130(1), and .172(1), by establishing
18 a process that could permit development activities in FWHCAs and their
19 buffers without adequate review for impacts to CAs?

20 The Friends briefly support these three issues by suggesting a more thorough and
21 supposedly more public review and approval process would be preferable to an
22 administrative approval process. In its opinion, the CAOs omit any procedure for oversight
23 of impacts to critical areas. The County argues the Friends have abandoned this issue.

24 While the Board agrees the briefing was less than adequate, the allegation in
25 essence implies that the County will do less than an appropriate job in administering its
26 ordinances. The Board cannot find evidence in the record supporting the Friends' assertions
27 and finds the Friends have failed to meet their burden of proof to establish GMA violations
28 as to Issue 12, 13 and 14.

29 **Issue 15 (General 11):**

30 Does the Financial Guarantee, at unnumbered section added to SJCC
31 Chapter 18.80, contravene RCW 36.70A.020(9, 10), .040(3), .060(2, 3),
32 .130(1), and .172(1) and Comp. Plan §§ 2.5.B. Goal 1 and Policies 1, 2, 8,
and 2.5.B.a.-d. because it allows monetary payment without CA

1 protection, does not include the BAS, is inconsistent with the Comp. Plan,
2 and frustrates the GMA goals to promote open space and recreation and
3 protect the environment?

4 The Friends allege the financial guarantee fails to protect critical areas and is
5 inconsistent with the Comprehensive Plan as it exacts payment rather than replacement of
6 critical area functions. It also suggests the financial guarantee is to be released 30 days
7 after the expected final approval date for the mitigation project, not after completion, and it
8 does not provide a mechanism for supplementing guarantee funds.

9 While the County again alleges the issue was abandoned, the Board finds the
10 imposition of a financial guarantee to ensure completion of work will serve a valid purpose.
11 While Section 26 of Ordinance 26-2012 does refer to an expected expiration date in
12 subsection D, subsection G is clear that financial guarantees are not to be released until the
13 actions guaranteed by the agreement have been completed and demonstrated to function.⁸²
14 The Friends have failed to meet their burden of proof to establish GMA violations as to Issue
15 15.
16
17

18 **Issue 16 (GHA & FFA 2):**

19 Does SJCC 18.30.120, which allows a substantial amount of development
20 in GHAs and does not encourage development outside of GHAs or address
21 impacts to human health and safety and the net loss of critical species and
22 habitats identified in the BAS, contravene RCW 36.70A.020(9, 10), .040(3),
23 .060(2, 3), .130(1), and .172(1) or conflict with the Comp. Plan goal and
24 policies for GHAs, Section 2.5.B.a., as well as Section 2.5.B. Goal 1 and
25 Policies 1, 2, 8, and 9 because it does not protect GHAs, does not include
26 the BAS, is inconsistent with the Comp. Plan, and frustrates the GMA goals
27 to promote open space and recreation and protect the environment?

28 **Issue 17 (GHA & FFA 3):**

29 Does SJCC 18.30.130, which allows any development in FFAs, including
30 areas of special flood hazard, contravene RCW 36.70A.020(9, 10), .040(3),
31 .060(2, 3), .130(1), and .172(1) or conflict with the Comp. Plan goal and
32 policies for FFAs, Section 2.5.B.b., as well as Section 2.5.B. Goal 1 and
Policies 1, 2, 8, and 9 because it does not protect FFAs, does not include

⁸² IR 40070.

1 the BAS, is inconsistent with the Comp. Plan, and frustrates the GMA goals
2 to promote open space and recreation and protect the environment?

3 The Friends argue allowing development in geologically hazardous areas or
4 frequently flooded areas ignores the *BAS Synthesis* and several comprehensive plan
5 policies. While it is true the BAS clearly states that “the most effective approach” is to
6 preclude development in such areas, it also states that buffers and other protections
7 applicable to critical areas should be sufficient and that avoidance is not always an option.⁸³
8 The GMA does not impose an independent duty to protect life and property.⁸⁴ Furthermore,
9 the Comprehensive Plan policies referenced by the Friends do not prohibit such
10 development. Comprehensive Plan Policy 3 includes the phrase “unless no practicable
11 alternative exists” and the referenced policies regarding FFAs use words such as “mitigate”
12 and “minimize”.⁸⁵
13

14 The Board finds and concludes the Friends have failed to meet its burden of proof to
15 establish GMA violations as to Issue 16 and 17.
16

17
18 **Issue 18 (Wetlands 8):**

19 Does the failure of the Wetland Ordinance to designate and protect ponds
20 other than large pond wetlands contravene RCW 36.70A.020(9, 10),
21 .040(3), .060(2, 3), .130(1), .170(1) and .172(1)?

22 The Friends state the CAOs fail to expressly designate and protect large pond
23 wetlands of 5 acres or less, stating that is inconsistent with BAS. The County takes the
24 position the Friends have abandoned this issue.

25 The Board, however, concludes the Friends have failed to meet their burden to
26 establish a GMA violation. The only reference to BAS provided by the Friends is to a table
27 providing an inventory of ponds and lakes in the County. The Friends’ argument lacks any
28 specific reference to BAS which would require protection. The Board finds the Friends have
29 failed to meet their burden of proof to establish GMA violations as to Issue 18.
30

31
32 ⁸³ IR 5942, IR 5956.

⁸⁴ See *Friends of Pierce County v. Pierce County*, Case No. 12-3-0002c, (FDO, July 9, 2012 at 98).

⁸⁵ Comprehensive Plan sections 2.2.D, Policy 3 and 2.5.B Policies i-iii.

Issue 19 (FWHCA 3):

Does the FWHCA Ordinance contravene RCW 36.70A.020(9, 10), .040(3), .060(2, 3), .130(1), .170(1) and .172(1) by failing to designate and protect FWHCAs that include: (1) all salmon species found in San Juan County, including Coho, Pink, and Sockeye salmon; (2) Waters of the State that include ponds, rivers, inland waters, underground waters, salt waters, or other surface waters; (3) pocket estuaries and barrier beaches; and (4) Purple Martin, Vaux's Swift, Sandhill Crane, and Pileated Woodpecker?

This issue alleges the FWHCA "under-designates" the various species and waters referenced in the issue. Petitioner then references WAC 365-190-130 which sets out the FWHCAs that must be "considered" for designation.

The County states it followed its BAS consultant's recommendations on inclusions, that it conducted the required consideration, that it included all salmonid species listed as endangered, threatened, or sensitive and that it analyzed the BAS related to species of local importance.⁸⁶ The following rules clarify this issue:

WAC 365-190-030(19) "Species of local importance" are those species that are of local concern due to their population status or their sensitivity to habitat alteration or that are game species.

WAC 365-190-130 (2) Fish and wildlife habitat conservation areas that must be considered for classification and designation include:

(a) Areas where endangered, threatened, and sensitive species have a primary association;

(b) Habitats and species of local importance, as determined locally;

It is clear to the Board the County "considered" other species and habitats for designation and that the decision on whether or not to designate species or habitats of local importance lies with the County in accordance with WAC 365-190-130.⁸⁷ Furthermore, Ordinance 29-2012 contains a provision in 18.30.160 G. allowing the public to nominate to the County species or habitats of local importance.⁸⁸

⁸⁶ See Ordinance 29-2012 Background Sections XIV and XV at IR 40126 and 40127.

⁸⁷ See by way of example, *BAS Synthesis*, Ch. 4, p. 41; Ch. 3, p. 33 and IR 90765-90769.

⁸⁸ See Ordinance SJC 18.30.160 G at 36 of 38; at IR 40156.

1 The Board finds the Friends have failed to meet their burden of proof to establish
2 GMA violations as to Issue 19.

3
4 **Issue 20 (FWHCA 10):**

5 Does the FWHCA Ordinance authorization for private shoreline
6 modifications, including docks, piers, bulkheads, bridges, fill, floats, jetties,
7 utility crossings, lifts, stairs, ramps, and other human-made structures, in
8 critical saltwater habitats, at SJCC 18.30.160.E.7.a.iv., SJCC
9 18.30.160.E.7.b., and SJCC 18.30.160.E.7.c. contravene RCW
10 36.70A.020(9, 10), .040(3), .060(2, 3), .130(1), and .172(1) by failing to
11 protect FWHCAs, failing to include BAS, and frustrating the GMA goals to
12 promote open space and recreation and protect the environment?

13 The Friends observe that shoreline modifications such as docks and beach
14 armoring represent a high threat to San Juan County shorelines. They state that the
15 applicable BAS recommends the prohibition of eelgrass and kelp disturbance by both
16 docks and bulkheads that alter wave energy and reduce light. In addition to referencing
17 potential impacts on eelgrass and kelp, they also note that surf smelt eggs' mortality
18 increases on armored beaches, as does the loss of epibenthic invertebrates and
19 overhanging vegetation.⁸⁹

20 The BAS is clear that docks, armoring and bulkheads represent a significant threat to
21 nearshore marine habitats.⁹⁰ However, the County contends the ordinances include
22 provisions to prevent or reduce the need for shoreline armoring and to minimize impacts
23 from any allowed modifications. It references the requirement for a geotechnical evaluation
24 for development proposed within 200 feet of a non-bedrock shoreline, requirements that
25 structures be located far enough from shorelines subject to erosive processes to allow for a
26 minimum life of a structure of 75 years as well as other protective regulations.⁹¹

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31 ⁸⁹ Petitioner Friends of the San Juans' Prehearing Brief at 28, 29.

32 ⁹⁰ *BAS Synthesis* at IR 5725; 5726: "... the effects of these structures [bulkheads] are considered the highest risk for San Juan County"; 5730: "... the impacts of bulkhead development will likely be significant for San Juan County's marine HCAs."

⁹¹ Respondent San Juan County's Prehearing Brief at 74.

1 While a total prevention of shoreline modifications would be the ideal, it appears to
2 the Board the choices made by the County comport with the BAS.⁹² Many of the
3 management options for eliminating or reducing impacts suggested by the BAS have been
4 incorporated as evidenced by the standards for shoreline modifications and docks in
5 Ordinance 29-2012 at pages 24 through 29.⁹³ The Board finds the Friends have failed to
6 meet their burden of proof to establish GMA violations as to Issue 20.
7

8
9 **Issue 21 (FWHCA 12):**

10 Does the FWHCA Ordinance's failure to require the implementation of
11 protections for animals that qualify as FWHCAs, where feasible, at SJCC
12 18.30.160.F.1 Table 3.11, contravene RCW 36.70A.020(9, 10), .040(3),
13 .060(2, 3), .130(1), and .172(1) by failing to protect FWHCAs by including
the BAS?

14 **Issue 22 (FWHCA 13):**

15 Does the FWHCA Ordinance's failure to identify protections for plants that
16 qualify as FWHCAs, at SJCC 18.30.160.F.2, contravene RCW
17 36.70A.020(9, 10), .040(3), .060(2, 3), .130(1), and .172(1) by failing to
18 protect FWHCAs?

19 **Issue 23 (FWHCA 14):**

20 Does the FWHCA Ordinance's failure to require the implementation of
21 protections for habitats of local importance, at SJCC 18.30.160.F.3 Table
22 3.12, contravene RCW 36.70A.020(9, 10), .040(3), .060(2, 3), .130(1), and
23 .172(1) by failing to protect FWHCAs?

24 **Issue 24 (FWHCA 15):**

25 Does the absence of criteria for approval of a proposed species or habitat of
26 local importance, at SJCC 18.30.160.G., contravene RCW 36.70A.020(9,
27 10), .040(3), .060(2, 3), .130(1), .170(1) and .172(1) by failing to offer an
28 unambiguous designation procedure and protect FWHCAs?

29 In the first three of these issues, the Friends merely make allegations and neither
30 relate those allegations to specific GMA statutory requirements nor to the BAS. The primary
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32

⁹² *BAS Synthesis*, Ch. 3 beginning at IR 5724.

⁹³ IR 40144-40149.

1 focus of the argument is that protection of certain animals (Issue 21), plants (Issue 22) and
2 habitats (Issue 23) is limited only to recommendations. Argument on the last two issues is
3 limited to one or two sentences. The County does observe in regard to Issue 21 that the
4 Friends refer to the "additional protection recommendations and requirements for specific
5 species." Those are in addition, the County states, to mandatory water quality buffers and
6 tree protection zones, both of which serve to protect animals and habitats.
7

8 Similarly, the Friends devote but two sentences to Issue 24 and again do not relate
9 the issue to a statutory requirement or to the BAS. The Board is unaware of any
10 requirement in the GMA which mandates the establishment of a process for designating
11 new habitats of local importance. Furthermore, there is nothing to prevent future proposals
12 for amendments to the various critical areas ordinances, something the Friends would be
13 free to pursue at a later date pursuant to the provisions of Ordinance 29-2012, Sec.
14 18.30.160 G⁹⁴ should it conclude that additional locally important habitats should be added.
15 The Board finds the Friends have failed to meet their burden of proof to establish GMA
16 violations as to Issues 21, 22, 23 and 24.
17

18
19 **Issue 25 (Wetlands 3):**

20 Do the water quality buffers sized pursuant to the procedure at SJCC
21 18.30.150.E.1., including the Green Development option, contravene RCW
22 36.70A.020(9, 10), .040(3), .060(2, 3), and .172(1) by failing to protect CAs,
23 failing to include BAS, and frustrating the GMA goals to promote open
24 space and recreation and protect the environment?

25 **Issue 26 (Wetlands 4):**

26 Do the habitat buffers identified at SJCC 18.30.150.E.1.b., including the
27 minimal tree protection zone and the excessive buffer averaging provisions,
28 contravene RCW 36.70A.020(9, 10), .040(3), .060(2, 3), .130(1), and
29 .172(1), by failing to protect CAs, failing to include BAS, and frustrating the
30 GMA goals to promote open space and recreation and protect the
31 environment?
32

⁹⁴ IR 40156.

1 **Issue 39 (Wetlands 10):**

2 Does the omission of monitoring and adaptive management in the Wetland
3 Ordinance contravene RCW 36.70A.020(9, 10), .040(3), .060(2, 3), .130(1),
4 and .172(1), by failing to protect wetlands, failing to include the BAS, and
5 frustrating the GMA goals to promote open space and recreation and
6 protect the environment?

7 **Issue 40 (FWHCA 16):**

8 Does the absence of monitoring and adaptive management in the FWHCA
9 Ordinance contravene RCW 36.70A.020(9, 10), .040(3), .060(2, 3), .130(1),
10 and .172(1) by failing to protect FWHCAs, failing to include the BAS, and
11 frustrating the GMA goals to promote open space and recreation and
12 protect the environment?

13 **A. Position of the Parties**

14 Based on the analysis and resulting decisions regarding Issues 25/26 and Issues
15 39/40, the Board has opted to consider them together. With the first two issues, the Friends
16 contend that both the water quality and habitat buffers are of inadequate size to protect
17 wetlands/habitat based on BAS. They criticize the fact that the County's water quality
18 buffers (Issue 25) only seek to remove between 60 and 70% of all contaminants. Those
19 facts, argue the Friends, are exacerbated by numerous exceptions and exemptions. It
20 criticizes the methodology for establishing water quality buffer widths and concludes the
21 resulting widths fall below that recommended by the BAS. Issue 26 is similarly challenged
22 by the Friends which argue the 30, 50 and 80 foot habitat buffers fail to comport with BAS
23 and that failure is again compounded by allowing buffer averaging. These Petitioners assert
24 the BAS recommends native tree and/or shrub vegetation ranging from 98 to 328 feet for
25 habitat buffers.⁹⁵ Averaging, asserts the Friends, again allows further reductions of these
26 buffer widths, from 37 1/2% to 60%.

27 The County's response regarding the water quality buffers first includes an
28 explanation of the buffer sizing methodology. It then asserts it considered DOE guidance
29 but used more recent recommendations provided by Mayer, *et al.*⁹⁶ The County also states
30 but used more recent recommendations provided by Mayer, *et al.*⁹⁶ The County also states
31 but used more recent recommendations provided by Mayer, *et al.*⁹⁶ The County also states
32 but used more recent recommendations provided by Mayer, *et al.*⁹⁶ The County also states

⁹⁵ IR 9655.

⁹⁶ IR 6330, *Meta-Analysis of Nitrogen Removal in Riparian Buffers*, Mayer, *et al* (2007).

1 its wetland consultant proposed 30-80 foot habitat buffers and that his recommendations
2 “were based on review of the applicable science... summarized in Chapters 2 and 4 of the
3 *BAS Synthesis*”⁹⁷

4 In addressing Issues 39 and 40, the Friends assert monitoring and an adaptive
5 management program, a precautionary approach, is required due to the County’s assertion
6 regarding a lack of peer reviewed evidence of the critical areas impacts from its existing
7 regulations, as well as the “high risk” approach the County has now adopted for the
8 protection of wetlands and FWHCAs.⁹⁸ The Friends reference WAC 365-195-920.⁹⁹

10 The County argues its CAOs protect the functions and values of critical areas and,
11 consequently, no adaptive management program is necessary.¹⁰⁰

13 **B. Legal Authorities**

14 The term “Critical Areas” is defined by statute as including Wetlands ecosystems and
15 Fish & Wildlife Habitat ecosystems.¹⁰¹ In designating and protecting critical areas, the GMA
16 requires that “counties and cities shall include the best available science in developing
17 policies and development regulations to protect the functions and values of critical areas.”¹⁰²
18 The “GMA requires regulations for critical areas to protect all functions and values of the
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24 ⁹⁷ San Juan County Prehearing Brief at 56.

25 ⁹⁸ Petitioner Friends of the San Juans’ Prehearing Brief at 49.

26 ⁹⁹ WAC 365-195-920, in part: “Where there is an absence of valid scientific information or incomplete scientific
27 information relating to a county’s or city’s critical areas, leading to uncertainty about which development and
28 land uses could lead to harm of critical areas or uncertainty about the risk to critical area function of permitting
29 development, counties and cities should use the following approach:

30 (1) A ‘precautionary or a no risk approach,’ in which development and land use activities are strictly limited
31 until the uncertainty is sufficiently resolved; and

32 (2) As an interim approach, an effective adaptive management program that relies on scientific methods to
evaluate how well regulatory and nonregulatory actions achieve their objectives. Management, policy, and
regulatory actions are treated as experiments that are purposefully monitored and evaluated to determine
whether they are effective and, if not, how they should be improved to increase their effectiveness. . . .”

¹⁰⁰ Respondent San Juan County’s Prehearing Brief at 78.

¹⁰¹ RCW 36.70A.030(5).

¹⁰² RCW 36.70A.172(1).

1 designated area, not just some of the functions.”¹⁰³ "Protection" means “preservation of the
2 functions and values of the natural environment.”¹⁰⁴

3 The County’s development regulations must preserve the existing functions and
4 values of critical areas. If development regulations allow harm to critical areas, they must
5 require compensatory mitigation of the harm. Development regulations may not allow a net
6 loss of the functions and values of the ecosystem that includes the impacted or lost critical
7 areas.¹⁰⁵ When developing alternative means of protection, counties and cities must assure
8 no net loss of ecological functions and values and must include the Best Available
9 Science.¹⁰⁶

11 “Although BAS does not require the use of a particular methodology, at a minimum
12 BAS requires the use of a scientific methodology.”¹⁰⁷ Although a county need not develop
13 scientific information through its own means, it must rely on scientific information and must
14 analyze that information using a reasoned process.¹⁰⁸

16 If a county chooses to disagree with or ignore scientific recommendations and
17 resources provided by state agencies or Indian tribes, which a county could do, the county
18 must unilaterally develop and obtain valid scientific information.¹⁰⁹ The GMA does not
19 require a county to follow BAS; rather it is required to “include” BAS in its record. A county
20 may depart from BAS if it provides a reasoned justification for such departure.¹¹⁰

22 When classifying and designating Fish and Wildlife Habitat Conservation Areas,
23 counties must include Best Available Science and should consider *inter alia*:

24 Evaluating land uses surrounding ponds and fish and wildlife habitat
25 conservation areas that may negatively impact these areas, or conversely,

26 ¹⁰³ *Yakima County v. Eastern Washington Growth Management Hearings Board*, 168 Wn. App. 680, 692
27 (2012).

28 ¹⁰⁴ WAC 365-196-830(3).

29 ¹⁰⁵ WAC 365-196-830(4). *See also Swinomish Indian Tribal Community v. Western Washington Growth*
30 *Management Hearings Board*, 161 Wn.2d 415, 430 (2007) [Skagit County’s adopted “no harm” standard
31 “protects critical areas by maintaining existing conditions”].

32 ¹⁰⁶ WAC 365-196-830(8).

¹⁰⁷ *Ferry County v. Concerned Friends of Ferry County*, 155 Wn. 2d. 824, 837 (2005).

¹⁰⁸ *Id.* at 836-837.

¹⁰⁹ *Ferry County v. Concerned Friends of Ferry County*, 155 Wn. 2d. 824, 836 (2005).

¹¹⁰ *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board*, 161
Wn.2d 415, 430-431 (2007).

1 that may contribute positively to their function, and

2 Establishing buffer zones around these areas to separate incompatible uses
3 from habitat areas.¹¹¹

4
5 Counties and cities should consider wetlands protection guidance provided by the
6 Department of Ecology, including the management recommendations based on the Best
7 Available Science, mitigation guidance, and provisions addressing the option of using
8 wetland mitigation banks.¹¹² Counties and cities should consult current information on
9 priority habitats and species identified by the Washington Department of Fish and
10 Wildlife.¹¹³ State natural resource agencies provide numerous guidance documents and
11 model ordinances that incorporate the agencies' assessments of the BAS.¹¹⁴
12

13 **C. Best Available Science**

14 Prior to addressing the specifics of these Issues put forth by the Friends, some
15 background information on buffers and related BAS is helpful.
16

17 Wetland buffers are vegetated areas adjacent to an aquatic resource that can,
18 through various physical, chemical, and/or biological processes, reduce impacts from
19 adjacent land uses. Buffers also provide the terrestrial habitats necessary for wildlife that
20 use wetlands to meet their life-history needs.¹¹⁵
21

22 The primary purpose of buffers is to protect and maintain the wide variety of functions
23 and values provided by wetlands (or other aquatic areas). The physical characteristics of
24 buffers—slope, soils, vegetation, and width—determine how well buffers reduce the adverse
25 impacts of human development and provide the habitat needed by wildlife species that use
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28 ¹¹¹ WAC 365-190-130(3).

29 ¹¹² WAC 365-190-090(2).

30 ¹¹³ WAC 365-190-130(4)(a).

31 ¹¹⁴ WAC 365-195-910(1).

32 ¹¹⁵ Sheldon, D., T. Hruby, P. Johnson, K. Harper, A. McMillan, T. Granger, S. Stanley, and E. Stockdale.
March 2005. *Wetlands in Washington State - Volume 1: A Synthesis of the Science*. Washington State
Department of Ecology. Publication #05-06-006. Olympia, WA. P. 5-23 (2005). This Ecology Publication meets
the definition and characteristics required for a Synthesis of Best Available Science. *Id* at p. 1-2; *San Juan*
County Best Available Science Synthesis, Ch. 2 *Wetlands*, p. 22 (May 24, 2011).

1 wetlands.¹¹⁶ Buffers protect wetland functions by removing sediments, nutrients
2 (phosphorus and nitrogen), and toxics (bacteria, metals, and pesticides).¹¹⁷

3 Generally, any land use that results in the creation of impervious areas, clearing of
4 vegetation, or compaction of soils will be incompatible with buffer functions. Typically,
5 buffers need to be densely vegetated with appropriate native vegetation to perform water
6 quality and habitat-related functions. In most cases, this requirement precludes any human
7 uses of the buffer. However, it may be necessary in some situations to use the outer area of
8 the buffer for initial treatment of surface water runoff, via the construction of biofiltration
9 swales or water-spreading devices to ensure sheet flow. Low-impact recreational use of the
10 buffer may also be considered.¹¹⁸

12 Buffer slope gradient is critical because, on slopes greater than 5%, sheet flow
13 can become channelized. Channelized flows have faster rates, more erosive
14 powers, and less contact with vegetation. Faster moving water has the capacity to carry fine
15 sediment particles farther than slower flows, even moving through dense vegetation.¹¹⁹

17 There are two major buffer categories: Water Quality Buffers and Wildlife Habitat
18 Buffers.¹²⁰ The County's CAOs include both of these as well as Tree Protection Zones
19 (TPZ).

21 **Water Quality Buffers**

22 A key BAS finding is that the primary water quality reason for protecting vegetated
23 buffers in San Juan County is to prevent pollution transport from land use development
24 sources to water bodies located downslope or downstream.¹²¹ Stopping pollution and
25

27 ¹¹⁶ *Id.*

28 ¹¹⁷ *Id.* at 5-25.

29 ¹¹⁸ Granger, T., T. Hruby, A. McMillan, D. Peters, J. Rubey, D. Sheldon, S. Stanley, E. Stockdale. April 2005.
30 *Wetlands in Washington State - Volume 2: Guidance for Protecting and Managing Wetlands*. Washington
State Department of Ecology, pp. 8-41 to 8-42 (2005).

31 ¹¹⁹ Sheldon, D., T. Hruby, P. Johnson, K. Harper, A. McMillan, T. Granger, S. Stanley, and E. Stockdale.
32 March 2005. *Wetlands in Washington State - Volume 1: A Synthesis of the Science*. Washington State
Department of Ecology. Publication #05-06-006. Olympia, WA. P. 5-29 (2005).

¹²⁰ *Id.* at 5-26.

¹²¹ *San Juan County Best Available Science Synthesis*, Ch. 4 *Upland Habitat*, p. 22 (May 24, 2011).

1 stormwater at its source is often the best strategy to protect water quality of wetlands and
2 other water bodies.¹²²

3 Stormwater runoff and associated contaminants from developed areas has been
4 identified as one of the leading threats to aquatic life and human health supported by the
5 Puget Sound ecosystem – reducing runoff pollutant loading from the built environment is a
6 key state priority action for the restoration of Puget Sound.¹²³

7 Well-configured buffers can passively exclude development, thereby protecting
8 wetlands and habitat areas from development impacts that result from removal of
9 vegetation, increase in impervious surfaces, erosion and compaction of soils, installation of
10 drains and ditches, and new pollutants.¹²⁴ For most pollutants, fish and other aquatic life are
11 harmed at much lower concentrations than are humans.¹²⁵

12 The use of buffers to protect and maintain water quality by removing sediments,
13 nutrients, and toxicants is best accomplished by ensuring sheet flow across a well vegetated
14 buffer with a flat slope (less than 5%).¹²⁶ The capacity of a wetland to store surface water
15 benefits the ecosystem by reducing peak flows, decreasing erosion, and protecting
16 hydrologic functions and water regimes.¹²⁷

17 There is a non-linear relationship between buffer width and the percentage of
18 pollutants removed by the buffer. A point of “relative diminishing returns” is reached for
19 increasing buffer widths when sediment removal exceeds 80%.¹²⁸ In order to achieve more
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26 ¹²² *San Juan County Best Available Science Synthesis*, Ch. 2 *Wetlands*, p. 60 (May 24, 2011).

27 ¹²³ *San Juan County Best Available Science Synthesis*, Ch. 7 *Stormwater Management*, p. 4 (May 24, 2011)
[Puget Sound Partnership 2010].

28 ¹²⁴ *San Juan County Best Available Science Synthesis*, Ch. 2 *Wetlands*, p. 60 and Ch. 4 *Upland Habitat*, p. 30
(May 24, 2011).

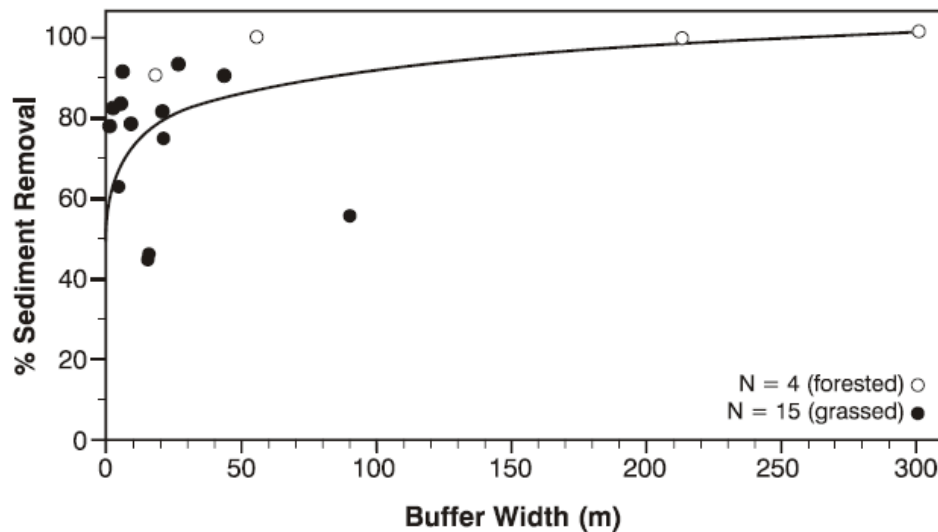
29 ¹²⁵ *San Juan County Best Available Science Synthesis*, Ch. 4 *Upland Habitat*, p. 16 (May 24, 2011).

30 ¹²⁶ Sheldon, D., T. Hruby, P. Johnson, K. Harper, A. McMillan, T. Granger, S. Stanley, and E. Stockdale.
31 March 2005. *Wetlands in Washington State - Volume 1: A Synthesis of the Science*. Washington State
Department of Ecology. Publication #05-06-006. Olympia, WA., page 5-38 (2005).

32 ¹²⁷ *Id.* at pp. 2-30 to 2-32 and p. 2-67.

¹²⁸ In addition to Figure 5-1, see also graphs included in Mayer’s analysis at IR 6332-6333, also included in the
BAS Synthesis at IR 5581.

1 than 80% sediment removal, the buffer width must increase by progressively larger
2 dimensions as reflected by the following graph:¹²⁹



16 **Figure 5-1. Relationship of percent removal to buffer width for the treatment of sediments**
17 **contained in surface water runoff (Desbonnet et al. 1994).**

19 Significant reductions in some pollutants, especially coarse sediments and the
20 pollutants adhered to them, can be accomplished in a relatively narrow buffer of
21 16 to 66 feet (5 to 20 m), but removal of fine sediments requires substantially
22 wider buffers of 66 to 328 feet (20 to 100 m).¹³⁰

24 Removal of dissolved nutrients requires long retention times (dense vegetation and/
25 or very low slope) and, more importantly, contact with fine roots in the upper soil profile (i.e.,
26 soils that are permeable and not compacted). Distances for dissolved nutrient removal are
27 quite variable, ranging in the literature from approximately 16 to 131 feet (5 to 40 m).¹³¹

31 ¹²⁹ Sheldon, D., T. Hruby, P. Johnson, K. Harper, A. McMillan, T. Granger, S. Stanley, and E. Stockdale.
32 March 2005. *Wetlands in Washington State - Volume 1: A Synthesis of the Science*. Washington State
Department of Ecology. Publication #05-06-006. Olympia, WA, at 5-30 to 5-31.

¹³⁰ *Id.* at 5-38.

¹³¹ *Id.*

1 **Wildlife Habitat Buffers**

2 Wetland habitat buffers provide a number of essential functions:¹³²

- 3 • Buffers can provide an ecologically rich and diverse transition zone
4 between aquatic and terrestrial habitats. This includes necessary
5 terrestrial habitats for many wildlife species that use and/or need
6 wetlands but also need terrestrial habitats to meet critical life
7 requirements.
8 • Buffers can screen wetland habitat from the disturbances of adjacent
9 human development
10 • Buffers provide connectivity between otherwise isolated habitat areas
11 and areas for dispersal and migration related to both individuals and
12 populations
13 • Sites for wildlife for foraging, breeding, and nesting
14 • Cover for escape from predators or adverse weather
15 • Source of woody debris and organic matter that provides habitat
16 structure and food, as well as moderation of water temperatures within
17 adjacent wetlands to support species that are sensitive to temperature
(e.g., fish, amphibians).

18 Protecting wildlife habitat functions of wetlands generally requires larger buffers than
19 protecting water quality functions of wetlands.¹³³

20
21 **D. Board Discussion and Analysis**

22 Whether or not the water quality and habitat buffer widths included in the County's
23 CAOs are of sufficient size necessitates review and consideration of the BAS contained in
24 the record. For example, it is the resulting percentage of contaminant removal, combined
25 with the water quality buffer sizes produced by the County's methodology that must be
26 considered to ascertain whether the County's system lies within the parameters of BAS
27 recommendations.
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¹³² *Id.* at 5-38 to 5-39.

¹³³ *Id.*

1 **Pollution Removal Percentage**

2 The Department of Ecology's buffer recommendations are based on removing 70%
3 or more of the sediment and pollutants from surface runoff before they reach the wetland
4 because 70% pollution removal was "judged to be adequate to prevent further degradation"
5 of the wetland.¹³⁴ BAS in the record shows a point of diminishing returns is reached as
6 increasing pollution removal approaches 75% to 80%, whereas pollution removal rates
7 above 80% become progressively much harder, and require relatively much larger buffers,
8 to achieve.¹³⁵
9

10 San Juan County Planning Staff originally suggested a targeted pollution removal of
11 65% to 75%¹³⁶ but the final ordinance adopted a pollution removal rate of 60% to 70%. BAS
12 indicates that pollution removal in the 60% range may be inadequate to protect the functions
13 and values of wetlands from further degradation. Thus, the County's lower percentage
14 pollution removal represents a departure from the Best Available Science in the record
15 without any reasoned justification.
16

17 **Wetland/Habitat Buffer Ranges**

18 Buffer width is nearly the only characteristic relevant to predicting water quality that
19 can be measured objectively and at reasonable cost, and so has commonly become the
20 basis for regulations.¹³⁷
21

22 BAS guidance from Ecology recommends determining the width of a buffer based on
23 multiple criteria, including consideration of the intensity of adjacent land use and impacts
24 resulting from that land use.¹³⁸ For wetlands with a high level of functions in improving water
25

26 ¹³⁴ Granger, T., T. Hruby, A. McMillan, D. Peters, J. Rubey, D. Sheldon, S. Stanley, E. Stockdale. April 2005.
27 *Wetlands in Washington State - Volume 2: Guidance for Protecting and Managing Wetlands*. Washington
28 State Department of Ecology., Appendix 8-E p. 5 (2005).

29 ¹³⁵ Sheldon, D., T. Hruby, P. Johnson, K. Harper, A. McMillan, T. Granger, S. Stanley, and E. Stockdale.
30 March 2005. *Wetlands in Washington State - Volume 1: A Synthesis of the Science*. Washington State
31 Department of Ecology. Publication #05-06-006. Olympia, WA, p. 5-30 to 5-31 (2005).

32 ¹³⁶ IR 110770, Memorandum from County Community Development & Planning to San Juan County Council,
dated September 14, 2012.

¹³⁷ *San Juan County Best Available Science Synthesis*, Ch. 2 *Wetlands*, p. 60 (May 24, 2011).

¹³⁸ Sheldon, D., T. Hruby, P. Johnson, K. Harper, A. McMillan, T. Granger, S. Stanley, and E. Stockdale.
March 2005. *Wetlands in Washington State - Volume 1: A Synthesis of the Science*. Washington State
Department of Ecology. Publication #05-06-006. Olympia, WA, p. 5-51 (2005).

1 quality, Ecology recommends a 100 foot buffer for proposed land uses with high impacts, 75
2 feet for moderate impacts, and 50 feet for low impacts.¹³⁹ Contrary to Ecology's guidance,
3 however, the County's adopted water quality buffer widths do not increase as a function of
4 impacts from adjacent land uses (i.e., BAS says higher wetland impacts require wider
5 protective buffers).

6 The County has adopted water quality buffer widths ranging from 30 feet to 205 feet
7 for wetlands with a high water quality sensitivity, 30 to 160 feet for medium and 30 to 125
8 feet for low impacts, buffer widths which on the low end fall outside the DOE
9 recommendations.¹⁴⁰ The County states it used the Mayer recommendations¹⁴¹ regarding
10 buffer width rather than DOE's. However, a review of Mayer fails to support the
11 establishment of water quality buffers as narrow as 30 feet. For example, Mayer's review of
12 89 separate studies focusing on nitrogen removal included the following observations: "We
13 chose these categories based on current state recommendations for minimum buffer widths
14 which currently range from 15.5 to 24.2 m[eters],"¹⁴² " . . . nitrogen removal effectiveness in
15 buffers > 50m[eters]¹⁴³ was significantly higher than in narrow buffers (0-25m[eters] . . ."¹⁴⁴
16 and " . . . 50, 75, and 90% nitrogen removal efficiencies in surface flow were estimated to
17 occur in buffers approximately 27, 81, and 131 m[eters] wide . . . "¹⁴⁵

18 The Board noted Mayer concluded the approximate buffer widths to achieve 75%
19 nitrogen removal varied from 18 meters (59 ft.) to 81 meters (266 ft.), significantly wider than
20 the widths included in Ordinance 28-2012, Table 3.6.¹⁴⁶ The Board further observes Figure
21 3-6, a Mayer graph, which appears to indicate the largest percentage of nitrogen removal
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28 ¹³⁹ Granger, T., T. Hruby, A. McMillan, D. Peters, J. Rubey, D. Sheldon, S. Stanley, E. Stockdale. April 2005.
29 *Wetlands in Washington State - Volume 2: Guidance for Protecting and Managing Wetlands*. Washington
30 State Department of Ecology. Appendix 8-E pp. 2-3 (2005).

31 ¹⁴⁰ Ordinance 28-2012, Table 3.6, IR 40105.

32 ¹⁴¹ IR 6330-6338.

¹⁴² IR 6331.

¹⁴³ One (1) meter is equal to three (3) feet, 3 & 3/8 inches.

¹⁴⁴ IR 6334.

¹⁴⁵ IR 6332.

¹⁴⁶ IR 6331; IR 5750.

1 occurs with buffers of approximately 25 meters (82 ft.), and that thereafter the “returns” of
2 nitrogen removal achieved with increasing buffer width decrease remarkably.¹⁴⁷

3 The *BAS Synthesis* include the following observation which reinforces the Board’s
4 concern regarding the adopted buffer widths’ compliance with BAS recommendations.¹⁴⁸

5 A more recent, comprehensive, and sophisticated analysis that used
6 statistical procedures (meta-analysis) to synthesize results from over 60
7 peer-reviewed studies of nitrate removal by buffers in temperate climates
8 found that widths of approximately 10 ft, 92 ft, and 367 ft are needed to
9 achieve 50%, 75%, and 90% removal efficiencies for nitrate (Mayer at al.
10 2005, Mayer et al. 2007) (Figure 1). This assumed that most inputs are
11 through subsurface flow. When surface flow dominates (as often occurs
12 during storms, and where subsurface storm drains have been installed
13 around homes), buffers of 109 ft, 387 ft, and 810 ft are needed to achieve
14 the same removal efficiencies. (Mayer et al. 2005).¹⁴⁹

15 In addition, the Record includes specific County discussions of both pollution removal
16 percentages and buffer widths which raise further Board concerns as to whether the
17 pollution removal percentages and buffer widths comport with BAS recommendations. As
18 mentioned above, a staff memorandum dated September 14, 2012, acknowledges DOE
19 uses a 70% treatment level for high impact uses. In addition, the memorandum observes
20 the “buffer sizes in the middle of [Table 3.6]” of the draft then under consideration
21 (September 14, 2012) were “5 to 10 feet smaller than they should be.” Those buffer widths
22 were subsequently reduced further with the adoption of Ordinance 28-2012.¹⁵⁰

23 The County minimum water quality buffer widths are not supported by the Mayer
24 analysis and fall outside of the range of BAS.

25 In regard to habitat buffers addressed in Issue 26, the County states its wetland
26 consultant proposed 30-80 foot habitat buffers and that his recommendations “were based
27 on review of the applicable science.” However, there is no specific reference to information
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30 ¹⁴⁷ IR 5752.

31 ¹⁴⁸ While Ordinance 28-2012 (Background paragraph “o” at IR 40087) includes the observation that there are
32 “errors in the stated buffer sizes” referenced in this paragraph, the County fails to clarify just what those errors
are or to point to other information in the record establishing the correct Mayer buffer widths.

¹⁴⁹ IR 5579.

¹⁵⁰ Those differences are indicated by a review of Table 3.6 of Ordinance 28-2012 at IR 40105 with the same
table at IR 110772.

1 in the BAS record supporting 30-80 foot habitat buffers. The County cites IR 110759-61 of
2 the Record but that reference only provides an unsupported assertion: "the proposed buffer
3 widths... are intended to address the needs of wetland-dependent species only, not all
4 wildlife."

5 On the other hand, the Friends' claim that BAS suggests habitat buffers of 98-328
6 feet appears to merely pick out one recommendation for buffer widths from numerous
7 recommendations.¹⁵¹ That citation is preceded by the following: "Thus, it is not appropriate
8 to choose a single study or buffer dimension to justify a buffer dimension, whether large or
9 small."¹⁵² However, the Board takes note of the statement that widths of buffers to protect
10 habitat are usually larger than those needed to protect functions that improve water quality
11 and that the widths of buffers needed to protect wildlife using wetlands range from 100 to
12 600 feet or more.¹⁵³ *Wetlands in Washington State, Volume 1* includes Table 5-5, a
13 summary of studies on wildlife habitat provided by buffers.¹⁵⁴ None of those studies include
14 a habitat buffer width as narrow as 30 feet.
15

16 The Board finds and concludes the County minimum habitat buffer widths fail to fall
17 within the ranges in the BAS.
18

19 Regarding buffer averaging, the Board does note the following comment from DOE:

20 The proposed habitat buffer averaging is not consistent with BAS, and
21 reducing the width of buffers that are already inadequate should not be
22 allowed. Allowing a minimum of a 30-foot habitat buffer will not protect
23 wetland functions, particularly on high habitat importance wetlands (a 63%
24 reduction in the required buffer width). To protect wetland functions, we
25 recommend that the width of the buffer not be reduced by more than
26 25%.¹⁵⁵
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29 ¹⁵¹ IR 9903.

30 ¹⁵² IR 9902.

31 ¹⁵³ Granger, T., T. Hruby, A. McMillan, D. Peters, J. Rubey, D. Sheldon, S. Stanley, E. Stockdale. April 2005.
32 *Wetlands in Washington State - Volume 2: Guidance for Protecting and Managing Wetlands*. Washington
State Department of Ecology, Appendix 8-E pages 2-3 (2005).

¹⁵⁴ IR 9906.

¹⁵⁵ IR 51669.

1 The BAS states buffer averaging is sometimes appropriate.¹⁵⁶ However, it also states
2 that BAS does not support narrowing a buffer on one side of a wetland merely to
3 accommodate development.¹⁵⁷ On the other hand, the *BAS Synthesis* concludes that
4 reducing the size of a buffer on one side of a wetland may be appropriate provided the width
5 of the opposite side of that wetland is expanded, resulting in an average overall that would
6 be the same as normally recommended. That is in fact what appears to be the County's
7 method: see Ordinance 28-2012, p. 25 of 39, Step 3.¹⁵⁸ However, an overall reduction of
8 buffers of up to 63% as a result of averaging is not sanctioned by the BAS.
9

10 The Board's review of the minimum buffer widths for both the water quality and
11 habitat buffers leads it to conclude these buffer widths fall outside the range of BAS.
12 Furthermore, as observed by DOE, other factors compound the situation. That agency
13 references concerns regarding the Stormwater Discharge Factors in CAO Table 3.3 and a
14 lack of consideration of site soils.¹⁵⁹ DOE further recommends against allowing the
15 reduction of buffer widths through averaging to no more than 25% (as opposed to 37 ½% to
16 greater than 60%).
17

18 The Friends raise concerns under Issue 37 regarding the County's "exemption" for
19 on-site sewage disposal systems in wetlands, FWHCAs, and their buffers. The Board
20 deems sewage disposal systems to be of critical significance and chooses to discuss it in
21 the context of Issues 25/26 and 39/40. Ordinance 28-2012 and Ordinance 29-2012
22 specifically allow such facilities both in the critical areas themselves and their buffers.¹⁶⁰
23 Such facilities are allowed in wetlands and their associated buffers "if no practicable
24 alternative exists."¹⁶¹
25

26 In addressing sewage disposal systems, the Friends point to the *BAS Synthesis*: ". . .
27 recent research has suggested that various household chemicals and personal care
28 products . . . are not consistently removed by onsite septic systems . . . The capacity of
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30 ¹⁵⁶ IR 5570.

31 ¹⁵⁷ *Id.*

32 ¹⁵⁸ IR 40106.

¹⁵⁹ IR 51668-51669.

¹⁶⁰ Ordinance 28-2012 at p. 28, IR 40109; Ordinance 29-2012 at p. 22, IR 40142.

¹⁶¹ Ordinance 28-2012 at p. 28, IR 40109.

1 naturally-occurring wetlands to detoxify most of these foreign substances is unknown. The
2 width of riparian buffer needed to detoxify these foreign substances is unknown.”¹⁶²

3 The County responds that onsite sewage systems are regulated by the health
4 department under state standards.¹⁶³ It contends that tree protection zone requirements
5 were included to reduce potential risks to wetlands and FWHCAs and that it provided a
6 needed reasoned analysis for BAS departure.¹⁶⁴

7
8 Approximately 75% of San Juan County’s population relies on onsite septic systems.
9 Improperly maintained or malfunctioning septic systems can result in high levels of harmful
10 viruses and bacteria in surface or groundwater. Even when functioning as designed, the
11 ability of septic systems to effectively treat almost anything other than bacteria and
12 excessive nutrients (nitrate and phosphorus) is limited or unknown.¹⁶⁵ Nutrients, viruses,
13 bacteria, and chemicals from septic tanks can also enter storm water when ponded or
14 inadequately treated effluent flows into surface runoff.¹⁶⁶

15
16 The inability of septic systems to fully remove or process common household
17 chemicals, estrogenic pharmaceuticals, antibacterial soaps, and surfactants (shampoo,
18 laundry, and dishwasher detergents) may be ecologically hazardous. These foreign
19 substances that septic systems do not effectively process can contaminate aquifers, have
20 been found in Puget Sound, and may interfere with fish and wildlife populations by
21 influencing fertility, natural chemical cues needed for homing/communication, and/or
22 disease susceptibility.¹⁶⁷

23
24 Beyond that information contained in the *BAS Synthesis*, the Board also notes
25 significant reservations expressed by the Department of Ecology: “Allowing installation of a
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30 ¹⁶² IR 5549.

31 ¹⁶³ Ordinance 28-2012 at IR 40091.

32 ¹⁶⁴ Respondent San Juan County’s Prehearing Brief at 74.

¹⁶⁵ *San Juan County Best Available Science Synthesis*, Ch. 4 *Upland Habitat*, p. 16.

¹⁶⁶ *San Juan County Best Available Science Synthesis*, Ch. 7 *Stormwater Management*, p. 5 (May 24, 2011).

¹⁶⁷ *San Juan County Best Available Science Synthesis*, Ch. 2 *Wetlands*, p. 60 and Ch. 4 *Upland Habitat*, p. 17-18 (May 24, 2011).

1 septic drainfield in a wetland draining directly to marine water with commercial or
2 recreational shellfish beds poses a serious health risk as well as ecological degradation.”¹⁶⁸

3 In allowing new sewage disposal systems in both wetlands and FWHCAs, and their
4 respective buffers,¹⁶⁹ the County explicitly took action to “depart from the BAS.”¹⁷⁰ The
5 County Council adopted Finding XII(e) in Ordinance 28-2012, in pertinent part as follows:

6 To minimize conflicts and confusion, the local Health Department requested
7 that on-site sewage disposal systems be regulated under the State
8 standards without additional local standards. To allow property owners to
9 maximize the use of their land, and to allow for the installation of on-site
10 sewage disposal systems when there is no practicable alternative,
11 components of sewage disposal systems are allowed in wetlands and their
12 buffers provided they are in conformance with State regulations.

13 This finding does not identify any science that supports sewage systems in wetlands
14 and their buffers nor has it offered any reasoned justification for departing from the BAS
15 recommendations to keep sewage systems and pollutants away from wetlands. There is no
16 science-based reasoning supporting the “no practicable alternative” provision. There is no
17 information before the Board regarding how “state standards” would apply. The Board also
18 observes that while authorization for the installation of such systems within a wetland is
19 allowed only if no practicable alternative exists, there is no such qualifier for installation of
20 these systems in FWHCAs. Additionally, there are no apparent standards for ascertaining
21 the lack of a practicable alternative.
22

23 The County is required to “protect” critical areas, including wetlands and FWHCAs,
24 and assure there is “no net loss” of ecological functions and values. The science in the
25 record points to potentially significant harm and loss of ecological functions if sewage
26 disposal systems are allowed in wetlands and FWHCAs. The science also points to further
27 degradation of water quality in the Puget Sound ecosystem, potentially in conflict with a key
28 State priority to restore Puget Sound. The County cannot protect critical areas and assure
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31 ¹⁶⁸ IR 51669.

32 ¹⁶⁹ Ordinance No. 28-2012, Table 3.8u, p. 28 of 39.

¹⁷⁰ The Board notes the County did not similarly acknowledge a BAS departure in regard to allowing on-site sewage disposal in FWHCAs and their buffers.

1 no net loss of the functions and values when on-site sewage systems are allowed in
2 wetlands, FWHCAs, and their adjoining buffers.

3 Allowing the installation of on-site sewage disposal systems in designated wetlands,
4 FWHCAs, and their buffers fails to protect critical areas and fails to comport with BAS.

5 Finally, in addition to the Board's conclusions regarding water quality and habitat
6 buffers and the allowance of sewage disposal systems, other factors compound the
7 situation. DOE referenced concern regarding the Stormwater Discharge Factors in CAO
8 Table 3.3 and a lack of consideration of site soils.¹⁷¹ As previously stated, DOE further
9 recommended against allowing the reduction of buffer widths through averaging to no more
10 than 25% (as opposed to 37 ½% to greater than 60%).
11

12 The concerns referenced above lead the Board to further find and conclude the
13 County's water quality and habitat buffers represent a high risk approach to critical area
14 protections, a position shared by DOE.¹⁷² That risk is created by a high level of uncertainty,
15 as indicated by the fact BAS lacks a specific sediment/pollutant removal percentage. In
16 addition, the *BAS Synthesis* acknowledge the existence of "data gaps" specific to San Juan
17 County, such as a lack of local studies of the County's wetlands and water quality
18 functions,¹⁷³ habitat buffer widths¹⁷⁴ and the effect of development on wetland-dependent
19 species.¹⁷⁵ The Synthesis further reference significant limitations regarding science
20 applicable to habitat buffers¹⁷⁶ and water quality buffers.¹⁷⁷ The County itself acknowledged
21 concerns regarding the high level of risk while also noting the direction of the County
22 legislative body was to establish regulations representing a "medium risk" to wetlands
23 "without establishing a monitoring and adaptive management program."¹⁷⁸
24
25

26 Based on the record before it, the Board finds and concludes there is a high level of
27 uncertainty about the level of protection provided critical areas by the wetland and habitat
28

29 ¹⁷¹ IR 51668-51669.

30 ¹⁷² IR 51666.

31 ¹⁷³ IR 5547-5548, IR 5830.

32 ¹⁷⁴ IR 5858, IR 5864.

¹⁷⁵ IR 5555.

¹⁷⁶ IR 5590-5591.

¹⁷⁷ IR 5591-5593.

¹⁷⁸ IR 110770.

1 buffers resulting from the lack of information regarding an appropriate percentage for
2 pollutant removal, the narrow minimum buffer widths combined with the extent of allowed
3 averaging, the failure to take into account soil type, some of the various uses and
4 exemptions allowed (as addressed elsewhere in this FDO), and the referenced data gaps.

5 The Board further finds and concludes it is not a single factor which leads to that high
6 level of risk and uncertainty but rather a combination of factors. For example, buffers which
7 only account for pollution removal between 60 and 70% may be appropriate if continuous
8 monitoring and an adaptive management program were in place. Similarly, some of the
9 allowed uses may be appropriate in wetlands and FWHCAs and/or their buffers, but the
10 extent of those uses combined with the other factors referenced above contribute to a high
11 risk level for critical area protection.
12

13 WAC 365-195-920, provides as follows (underlining added):
14

15 Where there is an absence of valid scientific information or incomplete
16 scientific information relating to a county's or city's critical areas, leading to
17 uncertainty about which development and land uses could lead to harm of
18 critical areas or uncertainty about the risk to critical area function of
19 permitting development, counties and cities should use the following
20 approach: A "precautionary or a no risk approach," in which development
21 and land use activities are strictly limited until the uncertainty is sufficiently
22 resolved; and

23 As an interim approach, an effective adaptive management program that
24 relies on scientific methods to evaluate how well regulatory and
25 nonregulatory actions achieve their objectives. Management, policy, and
26 regulatory actions are treated as experiments that are purposefully
27 monitored and evaluated to determine whether they are effective and, if not,
28 how they should be improved to increase their effectiveness. An adaptive
29 management program is a formal and deliberate scientific approach to
30 taking action and obtaining information in the face of uncertainty. To
31 effectively implement an adaptive management program, counties and cities
32 should be willing to:

Address funding for the research component of the adaptive management program;

Change course based on the results and interpretation of new information that resolves uncertainties; and

Commit to the appropriate timeframe and scale necessary to reliably evaluate regulatory and nonregulatory actions affecting critical areas protection and anadromous fisheries.

1 Regarding land use development impacts to Critical Areas, recent case law holds:

2 If the absence of relevant scientific information creates uncertainty about the
3 development risks to a critical area function, the County must follow WAC
4 365-195-920(1) and use a “precautionary or a no risk approach” that strictly
5 limits land use activities until the uncertainty is sufficiently resolved.¹⁷⁹

6 The “approach” taken by San Juan County is not “precautionary or no risk”. The level
7 of risk, taking into account the numerous factors considered in this section of the FDO,
8 necessitates reconsideration of those factors or possibly reconsideration combined with the
9 adoption of a monitoring and adaptive management program.

10 The Board finds and concludes: (1) the wetland and habitat buffers are not supported
11 by the Best Available Science, (2) contrary to BAS, the County’s adopted water quality
12 buffer widths do not take into account the intensity of impacts from adjacent land uses, and
13 (3) the County’s adoption of Ordinance Nos. 28-2012 and 29-2012 is clearly erroneous in
14 view of the entire record before the Board and in light of the goals and policies of the GMA.
15 The Friends have met their burden of proof to establish violations of RCW 36.70A.060 and
16 RCW 36.70A.172 regarding Issues 25 and 26. The Board further finds and concludes the
17 County’s actions were not guided by Goals 9 and 10.

18 The Friends have met their burden of proof to establish violations of RCW
19 36.70A.060 and RCW 36.70A.172 regarding Issues 39 and 40. The Board further finds and
20 concludes the County’s actions were not guided by Goals 9 and 10.

21 The Friends have met their burden of proof to establish violations of RCW
22 36.70A.060 and RCW 36.70A.172 regarding Issue 37(Wetlands 6)(subsection 15) and
23 Issue 38(FWHCA 7)(subsection 17) – the allowance of on-site sewage disposal systems in
24 wetlands, FWHCAs and their buffers. The Board further finds and concludes the County’s
25 actions were not guided by Goals 9 and 10.

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¹⁷⁹ *Yakima County v. Eastern Washington Growth Management Hearings Board*, 168 Wn. App. 680, 693 (2012).

1 **E. Conclusion**

2 The Board is left with the firm and definite conviction that a mistake has been made
3 through San Juan County's failure to protect the functions and values of Critical Areas from
4 degradation, together with San Juan County's failure to include the Best Available Science
5 in protecting Critical Areas.

6 The Board finds and concludes Ordinance Nos. 28-2012 and 29-2012 do not comply
7 with the requirements of RCW 36.70A.060(2) and RCW 36.70A.172(1).
8 Accordingly, the Board finds and concludes Ordinance Nos. 28-2012 and 29-2012 are
9 clearly erroneous in view of the entire record before the Board and in light of the goals and
10 requirements of the GMA.
11

12
13 **Issue 27 (FWHCA 4):**

14 Does the disjointed buffer system established by the FWHCA Ordinance,
15 including water quality buffers that expressly allow 40% of upland pollution
16 into FWHCAs and Tree Protection Zones that do not facilitate tree re-growth
17 or protect other vegetation, at SJCC 18.30.160.E.1., contravene RCW
18 36.70A.020(9, 10), .040(3), .060(2, 3), .130(1), and .172(1) because it fails
19 to protect functions and values of FWHCAs that include, but are not limited
20 to water infiltration, fine sediment, shade and microclimate, large woody
debris, litter fall and organic matter, and fish and wildlife habitat?

21 **Issue 28 (FWHCA 6):**

22 Does the FWHCA Ordinance authorization to average the Tree Protection
23 Zone by reducing portions by up to nearly 40% where dictated merely by the
24 purpose of the proposal contravene RCW 36.70A.020(9, 10), .040(3),
25 .060(2, 3), .130(1), and .172(1), particularly where none of the
26 compensatory trees would need to perform the same functions and values
as those to be removed?

27 These two issues address FWHCA buffers, with the Friends again asserting widths
28 which fail to meet the recommendations of BAS, inadequate percentage of pollution
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1 removal, the extensive uses allowed¹⁸⁰ and the allowed buffer width averaging all combine
2 to result in a failure to adequately protect FWHCAs.

3 The Friends cite numerous BAS references to buffer sizes necessary to protect
4 various species and observe the CAO does not provide the widths suggested. They add the
5 opinion that the Tree Protection Zones (TPZs) fail to cure those alleged deficiencies as they
6 allow vegetation removal, various uses, and averaging. They also state the coastal geologic
7 buffer lacks specific guidelines and does not mandate compliance with the required
8 geotechnical report.¹⁸¹

9
10 The County contends the pollution removal percentage of 60% is justified in that
11 streams and marine waters (as opposed to wetlands) have a continuous input of clean
12 water making them less sensitive to contaminants. Additionally, for specifically CAO
13 protected plants and animals, the water-quality sensitivity rating for wetlands is increased.¹⁸²

14 The County further states TPZs are designed to address functions such as water
15 temperature and organic material supply, while individual species are protected by SJCC
16 18.30.160.F. It observes no tree removal is allowed in the first 35 feet of TPZs and, outside
17 of that area, tree removal is subject to specific conditions. It states TPZs, when combined
18 with water quality buffers, protect the functions provided by trees and water quality.¹⁸³

19 Aquatic FWHCAs are potentially subject to water quality buffers, Tree Protection
20 Zones (TPZs) and coastal geologic buffers.¹⁸⁴ The water quality buffers applicable to
21 FWHCAs are the same as those for wetlands with the exception that the buffer is sized for
22 60% pollution removal.¹⁸⁵ TPZs' widths may be averaged subject to certain conditions.¹⁸⁶
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24 The Board notes that neither the Friends nor the County provide citations to BAS specifically
25 addressing a pollution removal percentage for streams or marine shorelines. The Friends
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29 ¹⁸⁰ Discussion of the "structures, uses and activities allowed" in wetlands and FWHCAs and their buffers are
30 addressed by the Board in conjunction with Issues 37 and 38.

31 ¹⁸¹ Petitioner Friends of the San Juans' Prehearing Brief at 35-37.

32 ¹⁸² Respondent San Juan County's Prehearing Brief at 60; Table 3.11, IR 40150.

¹⁸³ *Id.* at 61.

¹⁸⁴ SJCC 18.30.160.E.1, IR 40134-40135.

¹⁸⁵ See Step 3, Figure 3.2, Ordinance 29-2012 at IR 40136.

¹⁸⁶ SJCC 18.30.160.E.1, Step 5, IR 40138.

1 merely state the pollution removal percentage “conflicts with the BAS.”¹⁸⁷ The County’s
2 response only states the removal percentages are appropriate due to the added clean water
3 input.

4 The Board first observes that fish and other aquatic life are harmed by much lower
5 concentrations of various pollutants than are humans.¹⁸⁸ Secondly, the Board has
6 previously determined pollutant removal percentages of between 60 and 70% established
7 by the County for water quality buffers does not reflect consideration of BAS. Finally, the
8 Board also determined water quality buffer widths themselves fall outside of the range of
9 BAS in the record (See discussion of Issues 25/26 and 39/40). Those findings apply here as
10 well as FWHCAs’ water quality buffers are determined by the same methodology. The effect
11 is to create a FWHCA buffer system based on a faulty foundation made up of a low pollution
12 removal percentage and a narrow minimum buffer width. The Board finds and concludes
13 that the FWHCAs’ water quality buffers fall outside of the range of BAS in the record.
14

15 The Friends have met their burden of proof to establish violations of RCW
16 36.70A.060 and RCW 36.70A.172 regarding Issues 27/28 in regard to FWHCA buffers as
17 specifically addressed herein. The Board further finds and concludes the County’s actions
18 were not guided by Goals 9 and 10.
19

20 Consequently, while the Friends do cite BAS conclusions regarding buffer widths
21 “required to reduce disturbance,” distances from wetlands “used” by certain amphibians,
22 and buffers “needed to achieve species levels similar to ... [those] in nearby mature forests,”
23 the Board concludes it is unnecessary to address the specifics of those citations.¹⁸⁹
24 However, it does note those studies on their own do not support a conclusion that the
25 combination of 2 or possibly 3 buffers (water quality, coastal geologic and Tree Protection
26 Zone) will not protect critical areas. “Reducing disturbance” may not be necessary to
27 “protect” a species. Mandating a buffer for all lands potentially “used” may not be necessary
28 to protect.
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32 ¹⁸⁷ Petitioner Friends of the San Juans’ Prehearing Brief at 35.

¹⁸⁸ *San Juan County Best Available Science Synthesis*, Ch. 4 *Upland Habitat*, p. 16 (May 24, 2011).

¹⁸⁹ *Id.* at 36.

1 In regard to allowed tree removal within TPZs, the Board observes no removal is
2 allowed within the first 35 feet (only limited trimming and pruning is authorized).¹⁹⁰ Beyond
3 the 35 foot boundary, one primary structure and limited tree removal is allowed under the
4 following conditions:

- 5 1. The structure and other impervious surfaces are located landward of the water
6 quality buffer;
- 7 2. Best Management Practices are used to minimize erosion, sedimentation, and
8 soil disturbance;
- 9 3. No more than 40% of tree volume over 6 inches dbh are removed within a 10 year
10 period;
- 11 4. Stocking levels for trees are limited;
- 12 5. Remaining forest tree cover must be multi-aged and well distributed across the
13 zone;
- 14 6. All vegetation overhanging aquatic FWHCA's is retained; and
- 15 7. For primary structures located within the TPZ outside of the first 35 feet, there is a
16 low probability of increased windthrow of trees, as determined by a qualified
17 professional.
18
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21 The Friends have failed to meet their burden of proof in regard to their Issues 27/28
22 challenges involving allowed tree removal.

23 Buffer averaging is also subject to specific conditions. First of all, even with
24 averaging, the total area of the tree protection zone may not be decreased. Secondly, the
25 TPZ may not be reduced through averaging to a width less than the water quality buffer or
26 70 feet, whichever is greater. Finally, averaging is allowed only to "accomplish the purposes
27 of the proposal" and only then when no reasonable alternative is available.¹⁹¹ Consequently,
28 the Board concludes buffer averaging may be appropriate with the caveat that the minimum
29 water quality buffer width needs to reflect consideration of BAS.
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¹⁹⁰ SJCC 18.30.160.E.1; IR 40139.

¹⁹¹ SJCC 18.30.160.E.1, Step 5; IR 40138.

1 The Friends have failed to meet their burden of proof in regard to their Issues 27/28
2 challenge involving buffer averaging.

3 The Friends also argue the FWHCA Ordinance fails to protect FWHCAs and conflicts
4 with BAS as it does not require buffers for Type 5 “intermittent streams,” those flowing less
5 than six months per year. Type 5 streams are defined in the *BAS Synthesis* as follows:

6 Type Ns. Non-Fish-bearing Seasonal Streams (also called Type 5). These
7 are non-fish habitat streams in which surface flow is absent for at least
8 some portion of a year of normal rainfall and which are not located
9 downstream from any stream reach that is a Type Np Water. For brief
10 periods at least, Type Ns Waters must be physically connected by an
11 above-ground channel system to the ocean or two channels with perennial
12 flow (Type S, F, or Np Waters).¹⁹²

13 In support, the Friends reference the *BAS Synthesis*,¹⁹³ which includes statements
14 such as the “routine and perhaps crucial use of such intermittent streams . . . ponds, and
15 wetlands by . . . salmonid fish”¹⁹⁴ and other citations which also refer to fish. (Whether these
16 citations are actually referring to Type Ns, non fish-bearing streams, is not clear.) They also
17 cite studies by Wenger and Fowler, “upon whom the County appears to rely for eliminating
18 buffers from 6-month streams, [and which] conclude that ‘the most effective buffers are at
19 least 30 meters or 100 feet wide, composed of native forest, and are applied to all streams,
20 including very small ones,’” and confirm that “narrower buffers provide significantly less
21 benefits, and no buffer under 50 feet can be considered very effective.”¹⁹⁵ Pollock and
22 Kennard are cited, and the Friends include their statement that “to fully protect salmonids in
23 the Pacific Northwest, buffers should extend 250 feet along perennial streams and 1 full site
24 potential tree height for all seasonal streams.” An observation from Knutson and Naef
25 includes: “buffers of 150 feet should be placed along Type 4 & 5 streams or intermittent
26 streams to retain functioning riparian habitat.”¹⁹⁶
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31 ¹⁹² IR 5806.

32 ¹⁹³ IR 5807-5808.

¹⁹⁴ Petitioner Friends of the San Juans’ Prehearing Brief at 38.

¹⁹⁵ IR 007230, Tab 007219, *Protecting Streams*, at 1.

¹⁹⁶ IR 151497-98, Tab 151397, Knutson, at 87-88.

1 The County responds by first observing that buffers are not eliminated for Type 5
2 streams; the water quality buffers do apply to them and, within them, “vegetation including
3 trees” must be protected.¹⁹⁷ In addition, the County points to the requirement that the banks
4 of intermittent streams must remain “vegetated.”¹⁹⁸

5 Possibly due to the complex, site-specific buffer methodology, which includes the
6 application of up to three different buffers plus additional species-specific protection
7 recommendations and requirements, it is extremely difficult to establish that the County’s
8 FWHCA protection system fails to protect Type Ns streams. The applicable site-specific
9 buffer width determinations may or may not comport with the cited BAS. The Board is
10 unable to relate the buffer widths recommended by various authors which consist of precise
11 widths to the variable, site-specific widths which would be calculated under the County’s
12 methodology, again with the caveat that the minimum water quality buffer widths need to
13 reflect consideration of BAS.
14

15 The County’s actions are presumed to be valid and it is incumbent upon the
16 challenger to show the County’s actions are clearly erroneous. The Friends have failed to
17 meet their burden of proof in regard to the protection of Type Ns streams with the
18 understanding that such protections may be altered following consideration of minimum
19 water quality buffers and allowed pollutant percentages.
20
21

22 **Issue 29 (FWHCA 9):**

23 Does the FWHCA Ordinance’s mandatory reduction of shoreline water
24 quality buffers and Tree Protection Zones by up to 100% to accommodate
25 water views, at SJCC 18.30.160.E.6., contravene RCW 36.70A.020(9, 10),
26 .040(3), .060(2, 3), .130(1), and .172(1) by failing to protect FWHCAs, failing
27 to include BAS, and frustrating the GMA goals to promote open space and
28 recreation and protect the environment?

29 **Issue 30 (FWHCA 2):**

30 Does the FWHCA Ordinance’s broad authorization to allow setbacks
31 identified on historic subdivision plat maps, at SJCC 18.30.160.A.,
32

¹⁹⁷ Ordinance 29-2012, Figure 3.2, IR 40136-37.

¹⁹⁸ Ordinance 29-2012, Table 3.9, IR 40138.

1 contravene RCW 36.70A.020(9, 10), .040(3), .060(2, 3), .130(1), and
2 .172(1) by failing to protect FWHCAs, failing to include BAS, and frustrating
3 the GMA goals to promote open space and recreation and protect the
4 environment?

5 These two issues challenge shoreline buffer reductions to allow locating development
6 based on preexisting development, whether to protect views or for small lots developed prior
7 to 1991. The Friends argue these exceptions fail to protect critical areas and fail to comply
8 with BAS.

9 The County, however, points to the limiting application of SJCC 18.30.160A which
10 authorizes the challenged exception if and only if the proposed development “will result in
11 no net loss of shoreline ecological functions” or, in the event of view blockage by nearby
12 development, adverse impacts are identified, minimized and mitigated.¹⁹⁹ For critical areas,
13 the preferred option is to avoid negative impacts. However, when that is not an option, steps
14 to reduce and mitigate adverse impacts are appropriate when a jurisdiction follows a
15 mitigation sequencing process. View protection in the San Juan islands is a significant
16 issue. Under the San Juan County scheme, water quality and tree protection buffer
17 reductions are allowed for that purpose only if adverse impacts are mitigated.²⁰⁰
18

19 The Board finds the Friends have failed to meet their burden of proof to establish
20 GMA violations as to Issue 29 and 30.
21

22 **Issue 31 (General 9):**

23 Does the lack of oversight over activities in CAs and their buffers that do not
24 require project or development permit under SJCC 18.80.070.C.,
25 contravene RCW 36.70A.020(9, 10), .040(3), .060(2, 3), .130(1), and
26 .172(1) because it fails to protect CAs by identifying and evaluating the
27 individual and cumulative impacts of those activities, does not include the
28 BAS, and frustrates the GMA goals to promote open space and recreation
29 and protect the environment, and because it is inconsistent with Comp. Plan
30 §§ 2.5.B. Goal 1 and Policies 1, 2, 8, 9, and 2.5.B.a.-d.?
31
32

¹⁹⁹ IR 40143-44.

²⁰⁰ *Id.*

1 The challenge presented by the Friends in Issue 31 involves activities within critical
2 areas or their buffers which do not trigger a critical area review under the San Juan County
3 Code. It argues that the “many uses expressly exempted from [CAO] compliance” or review
4 and “implicitly” exempting activities which do not require critical area review, fails to include
5 BAS, fails to protect critical areas and is inconsistent with the Comprehensive Plan.

6 The County characterizes the Friends’ contentions as merely alleging an
7 inconsistency “due to a lack of oversight for activities that do not require a... permit” but
8 observes the Friends cite no legal authority to support the allegation. It contends the issue
9 was abandoned.²⁰¹

10 The Board agrees with the County that the Friends have failed to provide any legal
11 argument and have abandoned this issue. The Board finds the Friends have failed to meet
12 their burden of proof to establish GMA violations as to Issue 31.

13
14
15 **Issue 32 (General 4):**

16 Do exemptions from the CAO that include: (1) clearing activities (Section 21,
17 SJCC 18.30.110.B.); (2) unmonitored remodel or replacement of existing
18 structures, facilities, infrastructure systems, development areas, and uses
19 (SJCC 18.30.110.C.2.); (3) the installation, construction, replacement, or
20 modification of (a) electrical lines, (b) telecommunication lines, or (c) water
21 and sewer lines within private and public rights of way (SJCC
22 18.30.110.C.3.); (4) numerous land divisions (SJCC 18.30.110.C.5.); and
23 (5) all forest practices regulated under the Forest Practices Act (SJCC
24 18.30.110.C.6.) contravene RCW 36.70A.020(9, 10), .040(3), .060(2, 3),
25 .130(1), and .172(1) and Comp. Plan §§ 2.5.B. Goal 1 and Policies 1, 2, 8,
26 9, and 2.5.B.a.-d. because they do not protect CAs, do not include the BAS,
27 are inconsistent with the Comp. Plan, and frustrate GMA goals to promote
28 open space and recreation and protect the environment?

29 **Issue 33 (General 8):**

30 Do the provisions at SJCC 18.30.110.G. that preclude the designation of
31 critical areas, buffers, or Tree Protection Zones that qualify for designation,
32 and that allow for significant changes in existing structures, uses, and
activities in critical areas and their buffers contravene RCW 36.70A.020(9,
10), .040(3), .060(2, 3), .130(1), .170(1) and .172(1) and San Juan County

²⁰¹ Respondent San Juan County’s Prehearing Brief at 10.

1 Comprehensive Plan § 2.5.B. Goal 1 and Policies 1, 2, 8, 9 because they do
2 not designate and protect critical areas, do not include the BAS, are
3 inconsistent with the San Juan County Comprehensive Plan, and frustrate
4 the GMA goals to promote open space and recreation and protect the
5 environment?

6 **Issue 34 (Wetlands 2):**

7 Does the exemption at SJCC 18.30.150.D. for unmonitored impacts of all
8 development activities in Medium Habitat Importance-Sensitivity wetlands
9 up to 1,000 square feet in size or in Low Habitat Importance-Sensitivity
10 wetlands up to 2,500 square feet in size contravene RCW 36.70A.020(9,
11 10), .040(3), .060(2, 3), .130(1), .170(1) and .172(1), by failing to designate
12 and protect wetlands that are critical areas, failing to include the BAS, and
13 frustrating the GMA goals to promote open space and recreation and
14 protect the environment?

15 The Friends fail to address allegations regarding SJCC 18.30.110.B, SJCC
16 18.30.110.C.5, SJCC 18.30.110.C.6 or the allegations of inconsistencies with the
17 Comprehensive Plan. Those allegations will be deemed abandoned.

18 The Friends preface its concerns regarding the CAOs' exemptions referenced in
19 these three issues with the observation that general exemptions and smaller wetland
20 exclusions contravene the GMA and that any "broad" exemptions require a showing of
21 necessity and BAS consideration.²⁰²

22 Included in its alleged "broad" exemptions (Issue 32-SJCC 18.30.110.C.2 and SJCC
23 18.30.110.G) are remodels and replacement of existing structures. The Friends further
24 assert the challenged critical area ordinances allow an exemption for transmission and utility
25 lines, and water and sewer lines without any compensation for impacts and contrary to BAS
26 (Issue 32-SJCC 18.30.110.C.3).

27 The County responds by stating the SJCC 18.30.110.C.2 exemption (remodels and
28 replacements) is allowed only if no further intrusion is allowed into a critical area and there
29 are no "additional adverse effects on the functions and values of critical areas."²⁰³ In
30

31 ²⁰² Petitioner Friends of the San Juans' Prehearing Brief at 45.

32 ²⁰³ See the specific language of SJCC 18.30.110.C.2: "When conducted in accordance with the provisions of
this subsection (C), and other applicable requirements. The following uses and activities are exempt from
standard critical area regulations: The . . . repair, remodel, or replacement of existing structures . . . provided

1 addition, and of significance, is the Board's understanding that the exemption for remodels,
2 replacements, and the like is also subject to the requirements of SJCC 18.30.110.D and G
3 which impose significant standards and conditions for the avoidance, minimization and
4 mitigation for critical area impacts.

5 The County must protect critical areas, must preserve the existing functions and
6 values of critical areas, and must include the Best Available Science. If development
7 regulations allow harm to critical areas, they must require compensatory mitigation of the
8 harm. Development regulations may not allow a net loss of the functions and values of the
9 ecosystem that includes the impacted or lost critical areas.²⁰⁴ When developing alternative
10 means of protection, counties and cities must assure no net loss of ecological functions and
11 values.²⁰⁵

12
13 Regarding the exemption for remodels and replacements, the Board finds the Friends
14 have failed to come forward with scientific information to meet their burden of proof to
15 establish GMA violations as to Issue 32 regarding SJCC 18.30.110.C.2 and Issue 33
16 regarding SJCC 18.30.110.G.

17
18 However, regarding the exemption for certain transmission and utility lines located
19 within private or public rights of way which is included in SJCC 18.30.110.C.3, the County
20 states the exemption applies only if soil erosion is controlled and disturbed areas are
21 properly stabilized or revegetated. This exemption applies to the "installation, construction,
22 replacement, or modification" of certain utility lines. The general exemption set forth in SJCC
23 18.30.110.E (Optional Public Agency and Utility Exception) apparently applies everywhere
24 else but is subject to an extensive list of conditions. In contrast, the exemption for electrical,
25 telecommunications, and water/sewer lines is only subject to a narrow provision on soil
26 erosion.
27
28

29
30 there is no further intrusion into geologically hazardous areas, frequently flooded areas, wetlands, or FWHCAs
31 or their buffers; soil erosion is controlled; disturbed areas are promptly stabilized; and actions do not have an
32 additional adverse effect on the functions and values of critical areas."

²⁰⁴ WAC 365-196-830(4). See also *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board*, 161 Wn.2d 415, 430 (2007) [Skagit County's adopted "no harm" standard "protects critical areas by maintaining existing conditions"].

²⁰⁵ WAC 365-196-830(8).

1 BAS in the record indicates that any land use that results in the creation of
2 impervious areas, clearing of vegetation, or compaction of soils will be incompatible with
3 critical area functions. Typically, critical area buffers need to be densely vegetated with
4 appropriate native vegetation to perform water quality and habitat-related functions. In most
5 cases, this requirement precludes any human uses of the buffer.²⁰⁶ BAS also states that
6 wetland functions are lost or reduced when a utility right-of-way converts a forested wetland
7 to an emergent or shrub wetland.²⁰⁷ A utility corridor with a maintenance road has higher
8 impacts to a wetland than without a maintenance road.²⁰⁸

9
10 The Board finds and concludes that a blanket exemption for activities which could
11 result in significant impacts to a critical area, without any consideration of the quality of a
12 wetland, and which does not include steps to avoid, minimize or mitigate, fails to protect
13 critical areas.²⁰⁹ Regarding this blanket exemption for utility lines, the Board is left with the
14 firm and definite conviction that a mistake has been made through San Juan County's
15 failure to protect the functions and values of Critical Areas from degradation, together with
16 San Juan County's failure to include the Best Available Science in protecting Critical Areas.

17
18 In regard to Issue 32's challenge of SJCC 18.30.110.C.3, the Board finds and
19 concludes that Ordinance No. 26-2012 is clearly erroneous in view of the entire record
20 before the Board and in light of the goals and policies of the GMA. The Friends have met
21 their burden of proof to establish a blanket exemption for utility lines within Critical Areas
22 violates RCW 36.70A.060 and RCW 36.70A.172. The Board further finds and concludes the
23 County's actions were not guided by Goals 9 and 10 regarding that portion of Issue 32.

24
25 Issue 34 raises a concern regarding an exemption of regulatory control over impacts
26 to medium importance wetlands of less than 10,000 ft.² and low importance wetlands of less
27

28
29 ²⁰⁶ Granger, T., T. Hruby, A. McMillan, D. Peters, J. Rubey, D. Sheldon, S. Stanley, E. Stockdale. April 2005.
30 *Wetlands in Washington State - Volume 2: Guidance for Protecting and Managing Wetlands*. Washington
31 State Department of Ecology, pp. 8-41 to 8-42 (2005).

32 ²⁰⁷ *Id.* at Appendix 8-D, page 24.

²⁰⁸ *Id.* at Appendix 8-C, page 5.

²⁰⁹ *Friends of the San Juans v. San Juan County*, Case No.10-2-0012 (10/12 /2010) FDO at 24 ". . . the Board
finds that a regulation which allows EPFs on sites which could contain critical areas and which could provide
for less mitigation than otherwise required by BAS, fails to comply with GMA's mandate to protect critical area
functions and values."

1 than 2500 ft.² (SJCC 18.30.150.D). Here, the Friends state BAS stresses the importance of
2 small wetlands and does not support these exemptions.²¹⁰

3 The County's response to the wetland size exemption includes the observation that
4 its consultant's analysis concluded 97% of the County's "mapped" wetlands, including all
5 with a "high" sensitivity rating, would be subject to the ordinances. The County does
6 acknowledge in Ordinance No. 28-2012 that minimum size exemptions represent a potential
7 departure from BAS.²¹¹

8
9 The BAS does not support a general exemption for small wetlands although it is
10 stated that for "practical purposes, local jurisdictions may want to vary such thresholds
11 based on" among other things, wetland importance.²¹² In addition, the County appears to
12 have addressed comments from DOE that were set out in its letter of August 20, 2012.²¹³
13 DOE suggested the addition of language to the minimum size threshold exemptions to the
14 effect that exempt wetlands should be limited to those which are hydrologically isolated, are
15 not associated with a riparian area or buffer and/or are not part of a wetland mosaic. SJCC
16 18.30.150.D now includes the following language: "Regulated wetland mosaics greater than
17 2500 ft.² in size, collective or cumulative wetland area, are not exempt. Wetlands exceeding
18 the following size thresholds, and those that are part of a wetland mosaic greater than 2500
19 ft.² in size, are regulated under SJCC 18.30.150."²¹⁴
20
21
22

23 ²¹⁰ Petitioner Friends of the San Juans Prehearing Brief at 43, citing IR 9247: who "... we do not believe it is
24 appropriate to recommend a general threshold for exempting small wetlands in the Washington because the
25 scientific literature does not provide support for such a general exemption." Granger, T., T. Hruby, A. McMillan,
26 D. Peters, J. Rubey, D. Sheldon, S. Stanley, E. Stockdale. April 2005. *Wetlands in Washington State - Volume*
27 *2: Guidance for Protecting and Managing Wetlands*. Washington State Department of Ecology p. 8-13

28 ²¹¹ Regulatory Exemptions. To allow for reasonable and cost effective application of the regulations, most
29 jurisdictions, including San Juan County, have a minimum size under which wetlands will not be regulated.
30 The Planning Commission and County Council expressed a desire to retain exemptions for some small
31 wetlands. Using aerial and LiDAR imagery, the County performed an analysis and estimated the size
32 distribution of the County's small wetlands as follows. Wetlands smaller than 1000 ft.² were not tallied because
most could not be identified using aerial imagery.

848 wetlands (32% of total) are smaller than 10,000 ft.².

387 wetlands (15% of total) are smaller than 5000 ft.².

91 wetlands (3% of total) are smaller than 2500 ft.²

²¹² IR 5567 and 110824.

²¹³ IR 51434-35.

²¹⁴ IR 40097.

1 The Board finds the Friends have failed to meet their burden of proof to establish
2 GMA violations as to Issue 34 regarding SJCC 18.30150.D.

3
4 **Issue 35 (Wetlands 5):**

5 Does the unmonitored exemption for all structures, uses, and activities in
6 what would otherwise be by (sic) buffers and Tree Protection Zone protections
7 on the opposite side of a public road and some private roads from a
8 wetland, at SJCC 18.30.150.E.2., contravene RCW 36.70A.020(9, 10),
9 .040(3), .060(2, 3), .130(1), and .172(1), by failing to protect wetlands, failing
10 to include the BAS, and frustrating the GMA goals to promote open space
and recreation and protect the environment?

11 **Issue 36 (FWHCA 5):**

12 Does the FWHCA Ordinance exemption for all existing structures and
13 impervious areas in FWHCAs, their buffers, and Tree Protection Zones, at
14 SJCC 18.30.160.E.1. Step 6, contravene RCW 36.70A.020(9, 10), .040(3),
15 .060(2, 3), .130(1), .170(1) and .172(1) by failing to designate and protect
16 the FWHCAs in and around which those structures and impervious areas
17 are found, failing to include BAS, and frustrating the GMA goals to promote
open space and recreation and protect the environment?

18 The assertions made with these two issues are: 1) that not requiring buffers and Tree
19 Protection Zones to extend across public roads and some private roads, and 2) that
20 excluding the footprint of structures or other impervious surfaces conflicts with BAS and
21 does not protect critical areas.

22 The County observes the Friends argument includes the phrase that “at least one
23 study” made a different recommendation regarding excluding roads.²¹⁵ The essence of the
24 County’s argument is the Friends believe the County should have done things differently.
25 As to the exclusion of roads from buffer width calculations, the Friends merely reference one
26 study’s recommendations, combining that with a conclusory statement. The Board also
27 observes that the Friends’ argument highlights the difficulty of citing Board or appellate court
28 decisions in regard to BAS and the BAS record. The BAS in any particular decision may not
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30
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²¹⁵ Petitioner Friends of the San Juans’ Prehearing Brief at 45.

1 be similar to BAS relied on by a different jurisdiction and reflected in the decision
2 challenging that decision.

3 The Friends have failed to meet the applicable burden of proof to establish any GMA
4 violations in regard to Issues 35 and 36.

5
6 **Issue 37 (Wetlands 6):**

7 Do the unreviewed and unmonitored exemptions for: (1) existing or
8 developing agricultural activities in wetlands and their buffers (SJCC
9 18.30.150.E.3, Table 3.8.e.); (2) new and expanding agricultural activities in
10 wetlands and their buffers (SJCC 18.30.150.E.3, Table 3.8.f.); (3) non-
11 mandatory wetland restoration or enhancement activities in any category of
12 wetland and its buffer (SJCC 18.30.150.E.3, Table 3.8.g.); (4) new and
13 expanded orchards and gardens in wetland buffers (SJCC 18.30.150.E.3,
14 Table 3.8.h.); (5) new ponds in low habitat importance-sensitivity wetlands
15 (SJCC 18.30.150.E.3, Table 3.8.i.); (6) trails, stairs, and raised walkways
16 (SJCC 18.30.150.E.3, Table 3.8.j.); (7) drilling and digging of wells in the
17 outer 25% of wetland buffers (SJCC 18.30.150.E.3, Table 3.8.l.); (8) tree
18 removal (SJCC 18.30.150.E.3, Table 3.8.m.); (9) annual trimming and
19 pruning of up to 20% of vegetation in wetland buffers (SJCC 18.30.150.E.3,
20 Table 3.8.o.); (10) stormwater facilities in wetland buffers (SJCC
21 18.30.150.E.3, Table 3.8.p.); (11) new fences in wetlands and their buffers
22 (SJCC 18.30.150.E.3, Table 3.8.q.); (12) road and trail crossings in
23 wetlands and their buffers (SJCC 18.30.150.E.3, Table 3.8.r. and SJCC
24 18.30.150.E.6); (13) reasonable use exception, public agency/utility
25 exception, and non-conforming structures, uses, and activities in wetlands
26 and their buffers (SJCC 18.30.150.E.3, Table 3.8.s.); (14) unspecified
27 wetland "maintenance" (SJCC 18.30.150.E.3, Table 3.8.t.); and (15) on-site
28 sewage disposal systems in wetlands and their buffers (SJCC
29 18.30.150.E.3, Table 3.8.u.) individually or cumulatively contravene RCW
30 36.70A.020(9, 10), .040(3), .060(2, 3), .130(1), and .172(1) by failing to
31 protect wetlands, failing to include BAS, and frustrating the GMA goals to
32 promote open space and recreation and protect the environment?

33
34 **Issue 38 (FWHCA 7):**

35 Do the following unreviewed and unmonitored exemptions, either
36 individually or cumulatively, contravene RCW 36.70A.020(9, 10), .040(3),
37 .060(2, 3), .130(1), and .172(1) by failing to protect FWHCAs: (1) any
38 development, vegetation removal, or other site modification in a FWHCA or
39 buffer that does not require a project or development permit (SJCC
40 18.30.160.D.2.); (2) all structures, uses, and activities on the opposite side

1 of public roads and some private roads from an FWHCA (SJCC
2 18.30.160.E.1. Step 6); (3) annual removal of up to 20% of all tree foliage in
3 the Tree Protection Zone (SJCC 18.30.160.E.2.a.); (4) construction of one
4 primary structure and tree removal as close as 35 feet from the Ordinary
5 High Water Mark (SJCC 18.30.160.E.2.a.); (5) existing or developing
6 agricultural activities in FWHCAs and their water quality buffers (SJCC
7 18.30.160.E.2, Table 3.10.e.); (6) existing or developing aquacultural
8 activities in FWHCAs and their water quality buffers (SJCC 18.30.160.E.2,
9 Table 3.10.f.); (7) new and expanding agricultural activities in FWHCA water
10 quality buffers (SJCC 18.30.160.E.2, Table 3.10.g.); (8) new and expanding
11 aquacultural activities in FWHCA water quality buffers (SJCC
12 18.30.160.E.2, Table 3.10.h.); (9) non-mandatory restoration or
13 enhancement activities in an FWHCA and its water quality buffer (SJCC
14 18.30.160.E.2, Table 3.10.i.); (10) new and expanded orchards and gardens
15 in FWHCA water quality buffers (SJCC 18.30.160.E.2, Table 3.10.j.); (11)
16 trails, stairs, and raised walkways in FWHCAs and their water quality buffers
17 (SJCC 18.30.160.E.2, Table 3.10.k.); (12) drilling and digging of wells in the
18 outer 25% of water quality buffers (SJCC 18.30.160.E.2, Table 3.10.m.);
19 (13) annual trimming and pruning of up to 20% of vegetation in FWHCA
20 water quality buffers (SJCC 18.30.160.E.2, Table 3.10.o.); (14) stormwater
21 facilities in FWHCA water quality buffers (SJCC 18.30.160.E.2, Table
22 3.10.p.); (15) fences in FWHCA water quality buffers (SJCC 18.30.160.E.2,
23 Table 3.10.q.); (16) road and trail crossings in FWHCAs and their water
24 quality buffers and Tree Protection Zones (SJCC 18.30.160.E.2, Table
25 3.10.r.); (17) on-site sewage disposal systems in FWHCAs and their water
26 quality buffers (SJCC 18.30.160.E.2, Table 3.10.t.); and (18) reasonable
27 use exception, public agency/utility exception, and non-conforming
28 structures, uses, and activities in FWHCAs and their water quality buffers
29 (SJCC 18.30.160.E.2, Table 3.10.u.)?
30
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32

With these two issues, the Friends challenge a list of exemptions allowed in both the Wetlands and FWHCAs ordinances. Each of the ordinances includes a lengthy list of "structures, uses and activities" allowed in wetlands, FWHCAs and their buffers (beginning at IR 40106 for wetlands and at IR 40140 for FWHCAs). The Friends express a general concern that the CAOs do not provide for evaluation of the impacts of these activities, either

1 individually or cumulatively. The exemptions are subject to differing conditions and the
2 Board will address each in turn.²¹⁶

3
4 **Exemptions for activities which do not require a permit in FWHCAs and their**
5 **buffers. (SJCC 18.30.160.D.2).**

6 This issue was not addressed and is deemed abandoned.

7
8 **Exempting certain structures/pervious surfaces from buffer calculations (SJCC**
9 **18.30.160.E.1. Step 6)**

10 This issue was not addressed and is deemed abandoned.

11
12 **Exemption e-ongoing agriculture, or changing the type of farming,**
13 **management practices, and crops**

14 **Exemption f (wetlands), g (FWHCAs)-new and physically expanded agricultural**
15 **activities in wetlands and their buffers and FWCA buffers**

16 The Friends quote from the DOE Wetlands Guidance which states there is no
17 scientific basis for exempting wetlands that are prior converted croplands from wetland
18 regulations and it further recommends that new agricultural uses should be regulated in the
19 same manner as any other type of development.²¹⁷ The County points out the specific
20 language of these exemptions, which include provisions that such activities do not result in
21 additional adverse impacts to the functions and values of wetlands (exemption e) and that
22 are consistent with appropriate best management practices that will ensure no net loss of
23 wetland functions and values (exemption f).²¹⁸ One of the differences between exemption
24 “e” and exemption “f” is that the former relates to existing (or in development) agricultural
25 activities while the latter includes new and expanding agricultural activities. The Board notes
26 the concern expressed by DOE regarding the allowance of new and expanded agricultural
27
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31 ²¹⁶ Exceptions not briefed by the Friends will not be addressed and will be deemed abandoned. Challenges
32 referenced in the Brief but not listed in the issue statements will not be addressed. The latter include
Exemption c – removal of noxious weeds.

²¹⁷ Petitioner Friends of the San Juans' Prehearing Brief at 47.

²¹⁸ IR 40107 and 40140.

1 activities.²¹⁹ "Conversion of wetlands that are not currently in agricultural use to a new
2 agricultural use should be regulated by the same regulations as any new development. The
3 scientific literature does not support the conversion of wetlands to new agricultural uses
4 without review and conditioning through a critical areas ordinance."²²⁰ For example, land
5 use conversions to moderate or high intensity agriculture can have moderate to high
6 impacts to adjacent wetlands.²²¹

7
8 While the County's provisions regarding no further negative impact/no net loss of
9 functions and values addresses the concerns regarding existing uses, the BAS does not
10 support expansion of agricultural activities into wetlands. Regarding this exemption for new
11 and expanding agricultural uses, the Board is left with the firm and definite conviction that a
12 mistake has been made through San Juan County's failure to protect the functions and
13 values of Critical Areas from degradation, together with San Juan County's failure to include
14 the Best Available Science in protecting Critical Areas.

15
16 The Board concludes the County's action in exempting new and expanding
17 agricultural activities, Exemption f (wetlands) and Exemption g (FWHCAs), is clearly
18 erroneous in view of the entire record and in light of the goals and policies of the GMA. The
19 Friends have met their burden of proof to establish a violation of RCW 36.70A.060 and
20 RCW 36.70A.172 regarding Issues 37 and 38. The Board further finds and concludes the
21 County's actions were not guided by Goals 9 and 10.

22
23 The Board finds the Friends have failed to meet their burden of proof to establish
24 GMA violations related to Exemption e.

25
26
27
28
29 ²¹⁹ IR 51669, DOE correspondence of November 13, 2012, includes new and expanding agricultural activities
in its "areas of greatest concern."

30 ²²⁰ IR 9253, Granger, T. T. Hruby, A. McMillan, D. Peters, J. Rubey, D. Sheldon, S. Stanley, E. Stockdale.
31 April 2005. *Wetlands in Washington State - Volume 2: Guidance for Protecting and Managing Wetlands*.
Washington State Department of Ecology, Vol. 2, p. 8-19.

32 ²²¹ Granger, T. T. Hruby, A. McMillan, D. Peters, J. Rubey, D. Sheldon, S. Stanley, E. Stockdale. April 2005.
Wetlands in Washington State - Volume 2: Guidance for Protecting and Managing Wetlands. Washington
State Department of Ecology, Vol. 2, Appendix 8-C, p. 5 (2005).

Exemption g, i, t (wetlands), i (FWHCAs)- noncompensatory enhancement, construction of ponds, and wetland maintenance.

The Friends state BAS does not support “unlimited exemptions for noncompensatory enhancement, pond construction in low importance wetlands, wetland ‘maintenance’”. In support, it refers to the DOE Wetlands Guidance which states that noncompensatory enhancement may be appropriate in some instances but can increase impacts and should consequently be limited. The Board first observes the Friends refer only to “non-compensatory enhancement” in its briefing. It also notes the DOE reference in fact states non-compensatory enhancement may be appropriate in some instances. Finally, the Board also observes that any such activity must be approved by one or more Federal, state or local jurisdictions. The Board finds the Friends have failed to meet their burden of proof to establish GMA violations related to these exemptions.

Exemption j (wetlands), k (FWHCAs)-Trails/Stairs/Raised Walkways.

The Friends offer no support in its opening brief other than the statement the BAS does not support unchecked construction of trails, stairs, etc. BAS in the record indicates that unpaved trails have a low impact to adjacent wetlands, and low-impact recreational use may be considered in buffers.²²² The Board finds the Friends have failed to come forward with scientific information to meet their burden of proof to establish GMA violations related to these exemptions.

Exemption h (wetlands), i (FWHCAs)²²³- construction and expansion of up to 4,000 square feet of a buffer for orchards and gardens.

The Board acknowledges the Friends’ observation that the expansion of orchards and gardens into wetland and FWHCA buffers is not supported by BAS. DOE raised a concern regarding that issue as well in correspondence.²²⁴ The County also acknowledged

²²²Granger, T. T. Hruby, A. McMillan, D. Peters, J. Rubey, D. Sheldon, S. Stanley, E. Stockdale. April 2005. *Wetlands in Washington State - Volume 2: Guidance for Protecting and Managing Wetlands*. Washington State Department of Ecology, Vol. 2, pp. 8-41 to 8-42 (2005).

²²³ The Board notes that Ordinance 29-2012, SJCC 18.30.160.D.2.i does not address the construction or expansion for orchards and gardens. The Board assumes the reference is to SJCC 18.30.160.D.2.j

²²⁴ See IR 51669, DOE comments of November 13, 2012.

1 that such expansions are a departure from BAS.²²⁵ However, the County explained its
2 rationale for departure, identified possible risks as well as measures to limit such risk, all in
3 accordance with WAC 365-195-915.²²⁶

4 The Board finds the Friends have failed to meet their burden of proof to establish
5 GMA violations related to these exemptions.
6

7 **Exemption l (wetlands), m (FWHCAs)-drilling/digging wells in outer 25% of**
8 **buffers**

9 The Board finds and concludes that the Friends have abandoned this issue due to
10 inadequate briefing: argument is limited to a single, conclusory statement.
11

12 **Exemptions m, n, & o (wetlands), o (FWHCAs)-tree removal and foliage removal**

13 The Friends cite DOE's *Wetlands in Washington*, Volume 1 to support its allegation
14 that these exemptions fail to protect CAs and are contrary to BAS.²²⁷ They state removal of
15 up to 50% of the tree canopy and annual pruning of individual trees of 20% of their forest
16 foliage does not comport with BAS. They then contend vegetation removal might impact
17 invertebrate communities. They also cite a study which determined that removing as little as
18 3½% of forest cover in a rural, low density residential area altered water flow patterns.
19

20 The County responds that "minor pruning" is allowed for view purposes and as a fire
21 hazard reduction method, if tree and shrub health is maintained. It states the BAS observes
22 some wetland animals benefit from more sunshine and warmer temperatures.
23
24
25

26 ²²⁵ See IR 40090.

27 ²²⁶ "Testimony was provided regarding the importance of wetlands and surrounding areas for food production
28 in a community that is isolated from the mainland and has dry summers and limited supplies of freshwater. To
29 balance the need to protect wetlands with the need to produce food, gardens and orchards are allowed in the
30 outer 25% of buffers. Performance standards are included to minimize the risk of harm to wetlands, including
31 the use of appropriate BMPs; a prohibition on the use of synthetic chemicals; restrictions ongoing until after
32 ground nesting birds have left the nest (July 15); and a requirement that trees within Tree Protection Zones be
retained with regard to water quality functions, it is anticipated that the soils in gardens and orchards will, in
most cases, maintain high levels of organic material, and as a result will remain permeable and able to absorb
runoff from upland areas. With regard to habitat functions, vegetative screening and Tree Protection Zones will
still be retained immediately adjacent to wetlands."

²²⁷ 9901-02, 9912-13, 9792, 9759.

1 The Friends' citations do not support its allegation that "removal of up to 50% of the
2 tree canopy" is contrary to BAS. They also cite information that vegetation removal can
3 impact invertebrate communities and removing a small percentage of forest cover can alter
4 water flow patterns. While the Board assumes the latter two statements are accurate, the
5 statements do not support their argument that their allowance conflicts with BAS. The *BAS*
6 *Synthesis* includes the following statements²²⁸: "It is not necessary that a buffer always be
7 wooded (dominated by trees and shrubs) in order for it to benefit local biodiversity, but that
8 often helps." "Although wooded surroundings are important to a few wetland-dependent
9 species, many more species . . . seem not to have this need" "The suggestion that
10 forest cover in the [buffer] landscape benefits amphibians may not apply to all species that
11 are fully aquatic or that depend on nonforested upland habitat." "In summary, requirements
12 for wooded buffers around all wetlands might benefit some species . . . but, could have
13 detrimental effects on others. . . ."

14
15
16 The Board finds the Friends have failed to come forward with scientific information to
17 meet their burden of proof to establish GMA violations related to these exemptions.

18
19 **Exemptions p, q-stormwater facilities in buffers and fences in wetlands and**
20 **buffers and FWHCA buffers**

21 The Friends state the BAS suggests the need for regulation of storm water
22 management in wetlands and that fact implies there should be a similar position, that is,
23 regulation, for such facilities in buffers. It also raises a concern about "unreviewed"
24 exemptions for fence construction in wetlands, wetland buffers and FWHCA buffers.

25 The County responds by stating that components of storm water systems are allowed
26 only in buffers, not in wetlands and not in FWHCAs, and then only if no practicable
27 alternative exists, if the facilities conform with local and state storm water management
28 requirements and any applicable tree protection zone requirements. The County
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²²⁸ IR 5583-84.

1 acknowledges this authorization departs from BAS, but further states it provided a reasoned
2 analysis for that departure.²²⁹

3 In regard to fences, the County states they are allowed within buffers as well as in
4 FWHCAs provided they do not impede the flow of water or prevent the movement of
5 wetland animals and wildlife accessing the shoreline. It suggests the Friends provided no
6 authority whatsoever for its argument regarding fences and states that challenge should be
7 dismissed.
8

9 The Board finds the Friends have failed to come forward with scientific information to
10 meet their burden of proof to establish GMA violations related to these exemptions.
11

12 **Exemptions u (wetlands)²³⁰, t (FWHCAs) – septic in wetlands, FWHCAs, buffers.**

13 See discussion in the section addressing Issues 25/26 and 39/40 (above) where the
14 Board found and concluded that Ordinance Nos. 28-2012 and 29-2012 allowing sewage
15 disposal systems within wetlands, FWHCAs, and their buffers is clearly erroneous in view of
16 the entire record before the Board and in light of the goals and policies of the GMA. The
17 Friends have come forward with scientific information to meet their burden of proof to
18 establish a violation of RCW 36.70A.060 and RCW 36.70A.172 regarding those
19 exemptions. The Board finds and concludes exemptions for sewage disposal systems within
20 wetlands, FWHCAs, and their respective buffers are not supported by the Best Available
21 Science, and San Juan County failed to present a reasoned justification for departure from
22 the Best Available Science. The Board further finds and concludes the County's actions
23 were not guided by Goals 9 and 10.
24
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27

28 ²²⁹ IR 40091: "The existing regulations allow some stormwater management systems in wetland buffers and
29 the Planning Commission and County Council supported the retention of this option. To allow property owners
30 to maximize use of their land, when there is no practicable alternative, components of stormwater
31 management facilities are allowed in buffers. Areas of risk include the risk that the buffer will not be large
32 enough to adequately remove pollutants and that the pollutants will adversely affect the wetland. This risk is
limited by requirements that the system conform to local and State stormwater management requirements and
requirements for Tree Protection Zones."

²³⁰ The Friends reference exemption "s" in regard to wetlands. The Board assumes their reference is to "u" at
IR 40109.

Exemptions s (wetlands), u (FWHCAs)-development of existing and non-conforming uses, activities, and structures.

The referenced exemptions, including the reasonable use exceptions were addressed above.

Exemption r (wetlands)-roads and trails in wetlands, FWHCAs, and buffers.

The Friends state the allowance of roads, trails, culverts and bridges in wetlands,²³¹ FWHCAs²³² and their associated buffers fails to protect critical areas. It observes the ordinances fail to assess the potential impacts of such improvements and do not require compensation for impacts.

The County first observes that Friends failed to address trails, stairs, and raised walkways and asserts that portion of the issue was abandoned. It acknowledges that new or expanded roads, driveways, trails and associated culverts and bridges are allowed but only when done in conformance with County Code requirements. It disagrees with the assertion that mitigation is not required, referencing SJCC 18.30.110(F), the Critical Area Mitigation Requirements.²³³

Significantly, the construction of new or expanded roads, driveways, trails and associated culverts and bridges are subject to extensive conditions:

- They must be located on existing road grades, utility corridors, or previously disturbed areas, when practicable;
- Permits and approvals must be obtained from the appropriate state or federal agencies;
- Crossings must be at a 90° angle or as close to that degree as possible;
- Such crossings may not interfere with the flow and circulation of water or other wetland processes;
- Location and design must be evaluated by a qualified wetland professional to ensure wetland processes will not be adversely affected;
- Crossings must be designed to accommodate 100 year flood flows and, where practicable, must serve multiple properties;
- Adverse impacts must be mitigated;

²³¹ IR 40109-40111.

²³² IR 40142-40143.

²³³ IR 40049.

- 1 • There are also other, additional requirements.²³⁴

2 The Board finds the Friends have failed to meet their burden of proof to establish
3 GMA violations related to Exemption r (wetlands) – roads and trails in wetlands, FWHCAs,
4 and buffers.
5

6
7 **Issue 41 (General 13):**

8 Does the failure to address sea level rise fail to protect CAs as sea levels
9 squeeze them between rising waters and shoreline development, in
10 violation of RCW 36.70A.020(9, 10), .040(3), .060(2, 3), .130(1), and .172(1)
11 and Comp. Plan § 2.5.B. Goal 1 and Policies 1, 2, 8, 9?

12 **Issue 42 (GHA & FFA 14):**

13 Does the failure of the GHA & FFA Ordinance to address human safety and
14 critical species and habitat impacts from sea level rise as recommended by
15 the BAS contravene RCW 36.70A.020(9, 10), .040(3), .060(2, 3), .130(1),
16 and .172(1) because it does not protect CAs, does not include the BAS, and
17 frustrates the GMA goals to promote open space and recreation and protect
the environment?

18 **Issue 43 (Wetlands 9):**

19 Does the Wetland Ordinance's failure to address sea level rise contravene
20 RCW 36.70A.020(9, 10), .040(3), .060(2, 3), .130(1), and .172(1), by failing
21 to protect tidally-influenced wetlands, failing to include BAS, and frustrating
22 the GMA goals to promote open space and recreation and protect the
23 environment?

24 **Issue 44 (FWHCA 11):**

25 Does the FWHCA Ordinance's failure to address sea level rise contravene
26 RCW 36.70A.020(9, 10), .040(3), .060(2, 3), .130(1), and .172(1) by failing
27 to protect FWHCAs, failing to include BAS, and frustrating the GMA goals to
28 promote open space and recreation and protect the environment?

29 The Friends allege the failure to address sea level rise fails to protect people,
30 wetlands, fish, and wildlife. The County replies by stating the Friends provide no authority
31 for any such requirement and also point to the fact that the County plans to develop
32

²³⁴ IR 40109 Table 3.8 r; IR 40110, SJCC 18.30.150.E.6; and mitigation requirements of SJCC 18.30.110 (IR 40111).

1 informational materials to provide to permit applicants, citing Ordinance 29-2012,
2 Background M, XII.

3 The *BAS Synthesis* states that it is a reasonable assumption that buffers and other
4 protections applicable to critical areas should be sufficient to protect most floodplain
5 functions and public safety.²³⁵ That contention, combined with the extremely wide range of
6 estimates for Puget Sound Region Sea Level Rise by 2100²³⁶ together with the Board's
7 opinion that the protection of people, property, and wildlife from that type of threat ultimately
8 lies within the responsibility of elected officials. "They bear the burden of weighing risks to
9 lives and property within their jurisdiction."²³⁷

10 The Board finds the Friends have failed to meet their burden of proof to establish
11 GMA violations as to Issue 41, 42, 43 and 44.
12

13
14 **Issue 45 (General 12):**

15 Does the cumulative net loss from all of the activities that the General
16 Ordinance allows in CAs and their buffers, including those allowed through
17 exemption, exception, changes to existing uses, or lack of oversight,
18 contravene RCW 36.70A.020(9, 10), .040(3), .060(2, 3), .130(1), and
19 .172(1) and Comp. Plan §§ 2.5.B. Goal 1 and Policies 1, 2, 8, 9, and
20 2.5.B.a.-d. because it does not protect CAs, does not include the BAS, is
21 inconsistent with the Comp. Plan, and frustrates the GMA goals to promote
open space and recreation and protect the environment?

22 **Issue 46 (GHA & FFA 5):**

23 Do the cumulative impacts to human health and safety and fish and wildlife
24 habitat from all of the activities allowed in geologically hazardous and
25 frequently flooded areas pursuant to the GHA & FFA Ordinance contravene
26 RCW 36.70A.020(9, 10), .040(3), .060(2, 3), .130(1), and .172(1) because
27 they do not protect CAs, do not include the BAS, and frustrate the GMA
28 goals to promote open space and recreation and protect the environment?
29
30
31

32 ²³⁵ IR 5942.

²³⁶ See *BAS Synthesis*, IR 5940.

²³⁷ *Friends of Pierce County v. Pierce County*, Case No. 12-3-0002c, FDO at 102.

Issue 47 (Wetlands 11):

Does the cumulative net loss of functions and values from all of the activities that the Wetland Ordinance authorizes in wetlands and their buffers contravene RCW 36.70A.020(9, 10), .040(3), .060(2, 3), .130(1), and .172(1) by not protecting wetlands, not including the BAS, and frustrating the GMA goals to promote open space and recreation and protect the environment?

Issue 48 (FWHCA 17):

Does the cumulative net loss of functions and values from all of the activities that the FWHCA Ordinance authorizes in FWHCAs and their buffers and Tree Protection Zones contravene RCW 36.70A.020(9, 10), .040(3), .060(2, 3), .130(1), and .172(1) by not protecting CAs, not including the BAS, and frustrating the GMA goals to promote open space and recreation and protect the environment?

The Friends' argument for these four issues consists of the following two sentences:

As explained above, the cumulative impacts of the CAO's numerous exemptions, insufficient buffers, fragmented tree zones, and omitted species, habitats, and development ignore the BAS and will not protect CAs. Moreover, the County did not even attempt to quantify those impacts.²³⁸

While the County contends these issues should be dismissed due to inadequate briefing, the Board believes the Friends' concerns expressed regarding cumulative net loss of functions and values were adequately addressed in regard to other issues. In particular, the Board believes the Friends' argument (and the Board's analysis) in regard to Issues 25/26, 32/33/34, 37/38 and 39/40 was more than sufficient.

Furthermore, rather than repeating the analysis regarding those issues, the Board observes there are numerous factors included in the CAOs, and which have been addressed within the body of this FDO, which result in a high level of risk and uncertainty in regard to the protection of critical areas. That high level of risk necessitates reconsideration of those factors or, alternatively, reconsideration combined with the adoption of a monitoring and adaptive management program.

²³⁸ Petitioner Friends of the San Juans' Prehearing Brief at 51.

1 As to Issues 45, 46, 47 and 48, the Friends have failed to meet their burden of proof
2 due to insufficient briefing.

3
4 **CSA/Taggares:**

5 Issues addressing the designation, protection and inclusion of BAS are raised in
6 many of the CSA/Taggares issues and addressed in separate sections of their Prehearing
7 Briefs. Taggares incorporates CSA's issues and then alleges violations similar to those
8 raised by CSA preceded by the clause "As applied to the properties owned by Petitioner
9 [Taggares] on Blakely Island." While CSA and Taggares filed separate briefs, the Board will
10 consider their issues as set out in the Prehearing Order; that is, in a combined fashion.

11
12 CSA/Taggares issues which assert violations related to the designation of critical
13 areas, their protection and the inclusion of BAS include the following:²³⁹

14 **General Issue 1:**²⁴⁰

15 Whether the following terms set forth in Section 2, SJCC 18.20.010 ("A"
16 definitions) through Section 20, SJCC 18.20.230 ("W" Definitions) inclusive
17 are so vague and the subject of administrative discretion as to be in
18 violation of the requirements for adequate guidance to designate and
19 protect critical areas as identified by the Growth Board for compliance with
20 the GMA in violation of RCW 36.70A.020(10) .060(2), .170, .172, .480; WAC
21 365-190-020, -030, -040, -080, -090, -130 or alternatively are in conflict with
22 definitions already set in minimum guidelines for designation and protection
23 of critical areas:

24 ~~"Adaptive management"~~

25 ~~"Buffer zone, strip, or area"~~

26 ~~"Class I beach," "Class II beach," "Class III beach"~~

27 ~~"Critical area functions and values"~~

28 ~~"Development"~~

29 ~~"Development area"~~

30 ~~"Feasible alternative"~~

31 ~~"Garry oak woodlands and savannas"~~

32 ~~"Habitat"~~

~~"Impervious surface"~~

~~"Intensive"~~

²³⁹ CSA/Taggares' Wetlands Issues 1, 2 and 3 as well as FWHCA Issues 1 and 3, "Background" paragraph challenges, were dismissed.

²⁴⁰ The deleted words and phrases were abandoned by CSA/Taggares.

1 ~~"Native vegetation"~~
2 ~~"No net loss"~~
3 ~~"Primary association"~~
4 ~~"Rural environment"~~
5 ~~"Tree line"~~
6 ~~"Tree Protection Zone"~~

7 **General Issue 2:**²⁴¹

8 Whether the following terms set forth in Section 2, SJCC 18.20.010 ("A"
9 definitions) through Section 20, SJCC 18.20.230 ("W" Definitions) in
10 Ordinance 26-2012 are arbitrary and discriminatory and otherwise failed to
11 comply with the requirements of RCW 36.70A.020(6), property rights, and
12 the codified equivalent, RCW 82.02.020:

13 ~~"Adaptive management"~~
14 ~~"Buffer zone, strip, or area"~~
15 ~~"Critical area functions and values"~~
16 ~~"Development"~~
17 ~~"Development area"~~
18 ~~"No net loss"~~
19 ~~"Primary association"~~
20 ~~"Tree Protection Zone"~~

21 **General Issue 5:**

22 Whether the best available science identified in finding K I-XIII (pages 2-4 of
23 Ordinance 26-2012) complied with the requirements of RCW 36.70A.170,
24 .172, .480; Chapter 365-190 WAC and Chapter 365-195 WAC when:

- 25 1. The science identified did not support the application of buffers to the
26 built environment.
27 2. The County Council failed to provide a mechanism to determine when
28 the buffer science referenced was appropriate to the conditions and
29 applicable to the circumstances under review and properly applied through
30 this and the critical area specific ordinances.
31 3. The County sought only those opinions supporting its conclusions and
32 failed to consider why conflicting data was not considered or referenced.

General Issue 6:

Whether the maps identified as Shoreline Fish and Wildlife Habitat
Conservation Areas adopted in Section 1, SJCC 18.10.040 (B), (C), (D),
(E)(5), fail to meet the requirements of best available science and the proper
application of best available science when they fail to meet the requirements

²⁴¹ *Id.*

of RCW 36.70A.480, .060(2), .170, .172; WAC 365-190-020, -030(6), -040, -080, -130.

Wetlands Issue 4:

Whether Section 1, SJCC 18.30.150 and particularly subsections (A), (E) and (F) fail to comply with the requirements of RCW 36.70A.040, .060, .170, .172 and .480, and WAC 365-190-020, -030, -040, -080 and -090 and Chapter 365-195 WAC by

1. Failing to comply with State laws concerning consideration of and regulation of marine and lake shorelines;
2. Applying buffer schedules without regard to need or consequence;
3. Failing to consider alternatives more consistent with Section 2.5 of the Land Use Section of the San Juan County Comprehensive Plan;
4. Failing to include requirements imposed by court cases before the imposition of environmental servitudes to protect habitat;
5. Being internally inconsistent; and
6. Applying buffer requirement without support by best available science in that
 - a. The science identified did not support the application of buffers to the built environment.
 - b. The County Council failed to provide a mechanism to determine when the buffer science referenced was appropriate to the conditions and applicable to the circumstances under review and reasonably necessary.

FWHCAs Issue 7:

Whether Section 1, SJCC 18.30.160 and particularly subsections (A), (B), (C), (E), (F) and (G) fail to comply with the requirements of RCW 36.70A.020(6), .040, .060, .170, .172 and .480, and WAC 365-190-020, -030, -040, -080 and -130, and Chapter 365-195 WAC by

1. Failing to properly define FWHCAs;
2. Failing to comply with State laws concerning consideration of and regulation of marine and lake shorelines;
3. Applying buffer schedules without regard to need or consequence;
4. Adopting tree protection, water quality and geologic buffers inconsistent with Section 2.5 of the Land Use Section of the San Juan County Comprehensive Plan;
5. Failing to require demonstration of nexus proportionality and reasonable necessity with the burden of proof on the County before the imposition of environmental servitudes to protect habitat;
6. Being internally inconsistent; and

1 7. Applying buffer requirement without support by best available science
2 in that the science identified did not support the efficacy of the buffer
3 programs selected on lands characterized by the built environment.

4 **FWHCAs Issue 11:**

5 Whether the issues raised in connection with the CSA appeal of General
6 Ordinance 26-2012 show it is inconsistent with the GMA as those sections
7 apply to areas covered by Ordinance 29-2012 for the reasons stated in that
8 appeal, which are incorporated herein by reference in its entirety.

9 **Classification/Designation - RCW 36.70A.170 and RCW 36.70A.480(5)**

10 CSA/Taggares argues the County failed to properly classify and designate FWHCAs
11 in violation of RCW 36.70A.170. They argue Ordinance 29-2012 lacks a definition of
12 FWHCAs and then “purports” to define areas designated by “types”. Examples include
13 shellfish areas, kelp and eelgrass beds and spawning and holding areas for forage fish.
14 These Petitioners contend the County’s fish and wildlife habitat conservation area
15 Ordinance failed to distinguish between such areas that are pristine or degraded; failed to
16 actually designate shorelines which:

18 . . . serve a critical role in sustaining needed habitat and species for the
19 functional integrity of the ecosystem, and which, if altered, may reduce the
20 likelihood that the species will persist over the long term. . . .²⁴²

21 This argument is based on CSA/Taggares’ position the County did not properly consider the
22 “and if altered” clause.

23 CSA/Taggares also asserts RCW 36.70A.480(5) required San Juan County to
24 demonstrate which shorelines meet the minimum guidelines definition of a critical area.²⁴³ It
25 concludes its argument with the statement that the County’s failure means it has not
26 properly classified and designated FWHCAs.

27 The County contends it used an approach approved by the Eastern Washington
28 Growth Management Hearings Board, one using an “on-site inspection at the time of permit
29
30

31
32 ²⁴² Petitioner Common Sense Alliance’s Prehearing Brief at 16, referencing WAC 365-190-030(6)(a) and WAC 173-26-221(2)(c)(iii).

²⁴³ WAC 365-190-030(6)(a).

1 application.”²⁴⁴ The County argues designation does not require or mandate a jurisdiction to
2 “map out” all critical areas: to assess every parcel of land and determine whether it includes
3 critical area habitat. The County opines its method is preferable as mapping of all properties
4 in a county with such extensive marine shorelines would be impractical, consideration of the
5 “and when altered” clause is more appropriate when the extent of alteration is actually
6 known and, finally, it contends mapping is not a GMA requirement.
7

8 The County states its method first classifies types of critical areas, such as the
9 previously referenced shellfish areas and kelp and eelgrass beds. Rather than
10 geographically delineate each type of critical area, the County maps are mere guidelines
11 which raise the possibility of a critical area location.²⁴⁵ Thereafter, a possible site visit or a
12 required inventory of any proposal involving marine shoreline development serves to
13 actually “designate” the critical area.
14

15 A portion of CSA/Taggares’ designation argument focuses on alleged RCW
16 36.70A.480(5) violations:

17 Shorelines of the state shall not be considered critical areas under this
18 chapter except to the extent that specific areas located within shorelines of
19 the state qualify for critical area designation based on the definition of
20 critical areas provided by RCW 36.70A.030(5) and have been designated as
21 such by a local government pursuant to RCW 36.70A.060(2).

22 They state this statute should be interpreted to require jurisdictions to map specific
23 geographic locations as critical areas within shorelines. However, there is no definition in the
24 statute for the term “specific areas,” and these Petitioners cite no legal authority to support
25 the argument. To the contrary, Department of Commerce regulations specifically anticipate
26 the need to designate critical areas using “maps” and/or “performance standards,” with a
27 preference for performance standards when adopting land use regulations because maps
28 are less precise. WAC 365-190-040(5)(b). Additionally, WAC 365-190-080(4) provides
29 (emphasis added):
30
31
32

²⁴⁴ *Woodmansee v. Ferry County*, Case No. 00-1-0007, FDO at 2, 3 (8/18/2000).

²⁴⁵ SJCC 18.80.020 and .070.

1 Counties and cities should designate critical areas by using maps and
2 performance standards.

3 (a) Maps may benefit the public by increasing public awareness of critical
4 areas and their locations. County and city staff may also benefit from maps
5 which provide a useful tool for determining whether a particular land use
6 permit application may affect a critical area. However, because maps may
7 be too inexact for regulatory purposes, counties and cities should rely
8 primarily on performance standards to protect critical areas. Counties and
9 cities should apply performance standards to protect critical areas when a
10 land use permit decision is made.

11 (b) Counties and cities should clearly state that maps showing known critical
12 areas are only for information or illustrative purposes.

13 San Juan County's method for both classification and designation of critical areas
14 complies with the Minimum Guidelines promulgated by the Department of Commerce at
15 chapter 365-190 WAC. See WAC 365-190-040 set forth in part below (emphasis added):

16 (4) Classification is the first step in implementing RCW 36.70A.170 and
17 requires defining categories to which natural resource lands and critical
18 areas will be assigned.

19 (a) Counties and cities are encouraged to adopt classification schemes that
20 are consistent with federal and state classification schemes and those of
21 adjacent jurisdictions to ensure regional consistency. Specific classification
22 schemes for natural resource lands and critical areas are described in WAC
23 365-190-050 through 365-190-130.

24 (b) State agency classification schemes are available for specific critical
25 area types, including the wetlands rating systems for eastern and western
26 Washington from the Washington state department of ecology, the priority
27 habitats and species categories and recommendations from the Washington
28 state department of fish and wildlife, and the high quality ecosystem and
29 rare plant categories and listings from the department of natural resources,
30 natural heritage program. The Washington state department of natural
31 resources provides significant information on geologic hazards and aquatic
32 resources that may be useful in classifying these critical areas. Not all areas
classified by state agencies must be designated, but such areas may be
likely candidates for designation.

(5) Designation is the second step in implementing RCW 36.70A.170.

(a) Pursuant to RCW 36.70A.170, natural resource lands and critical areas
must be designated based on their defined classifications. For planning
purposes, designation establishes:

(i) The classification scheme;

1 (ii) The distribution, location, and extent of the uses of land, where
2 appropriate, for agriculture, forestry, and mineral extraction; and
3 (iii) The general distribution, location, and extent of critical areas.
4 (b) Inventories and maps should indicate designations of natural resource
5 lands. In circumstances where critical areas cannot be readily identified,
6 these areas should be designated by performance standards or definitions,
7 so they can be specifically identified during the processing of a permit or
8 development authorization.
9 (c) Designation means, at a minimum, formal adoption of a policy statement,
10 and may include further legislative action. Designating inventoried lands for
11 comprehensive planning and policy definition may be less precise than
12 subsequent regulation of specific parcels for conservation and protection.

13 San Juan County first considered the various categories of FWHCAs and then
14 adopted various “classifications” of FWHCAs. It then established a methodology to
15 specifically designate them. The “general distribution, location and extent of critical areas” is
16 established by various maps:

17 Maps of FWHCAs, including those created and maintained by State and
18 Federal agencies, are available from San Juan County. These maps show
19 lakes, the location and type of most streams, and the approximate location
20 of some protected species and habitats. These maps are however only a
21 guide to the possible location of these critical areas, and conditions in the
22 field control.²⁴⁶

23 While the County has assembled some critical area maps, it is clear that those maps
24 do not serve to designate FWHCAs. Conditions in the field control. As addressed elsewhere
25 in this FDO, the County’s system is site specific. Mapping of specific fish and wildlife habitat
26 conservation critical areas is not a GMA requirement.²⁴⁷

27
28 ²⁴⁶ SJCC 18.30.160C, IR 40132.

29 ²⁴⁷ “Such a process does not require local governments to immediately map all critical areas within their
30 jurisdictions. This is consistent with the Minimum Guidelines, which contemplate a performance standard
31 approach to designation. See WAC 365-190-040. . .

32 Thus, the Board holds that the Act requires local governments to designate all lands within their
jurisdictions which meet the definition of critical areas. . . The requirement to designate may be met by
designating or mapping known critical areas now or by adopting a process to designate or map them as
information becomes available.” *Pilchuck v. Snohomish County*, Case No. 95-3-0047c, FDO 12/6/95 at 16.
(emphasis added)

1 Furthermore, the Board concurs with the County that the extent of alteration is more
2 easily considered when a specific development project is proposed.

3 The Board finds and concludes that CSA/Taggares have failed to meet their burden
4 of proof to establish violations of RCW 36.70A.170 or RCW 36.70A.480(5) or any of the
5 referenced chapter 365-190 WAC sections in regard to Wetlands Issue 4, and FWHCAs
6 Issues 7 and 11.
7

8 **Protection - RCW 36.70A.060(2)**
9

10 CSA/Taggares contend the term “primary association” is vague and susceptible to
11 multiple interpretations resulting in a lack of sufficient guidance to County staff administering
12 the CAOs.²⁴⁸ Ordinance 26-2012 defines the term as follows:

13 “Primary Association” in the context of critical area regulations refers to
14 those areas that provide fish and wildlife habitat, including physical and
15 biological features that are necessary for a species to survive over the long
16 term. Examples include areas that are necessary for essential life cycle
17 functions, including areas used for feeding, nesting, breeding, and
rearing.²⁴⁹

18 These Petitioners contend the definition fails to consider the two-part elements of the
19 required definition of FWHCAs set out in WAC 365-190-030(6)(a)²⁵⁰ and that it lacks the
20 necessary degree of specificity for a site-specific delineation.
21

22 The County observes that the term “primary association” is not defined by state rule
23 or statute. Consequently, the County contacted the departments of Commerce and Fish and
24 Wildlife and crafted the definition based on guidance provided by them. The County also
25

26
27 ²⁴⁸ CSA/Taggares abandoned challenges asserted in its General Issues 1 and 2 as to all words and phrases
28 other than “primary association”. See List of Issues Adopted and Abandoned-CSA and Taggares, filed June
10, 2013.

29 ²⁴⁹ SJCC 18.20.160(“P” Definitions), Ordinance 26-2012, IR 40033.

30 ²⁵⁰ WAC 365-190-030(6)(a) “Fish and wildlife habitat conservation areas” are areas that serve a critical role in
31 sustaining needed habitats and species for the functional integrity of the ecosystem, and which, if altered, may
32 reduce the likelihood that the species will persist over the long term. These areas may include, but are not
limited to, rare or vulnerable ecological systems, communities, and habitat or habitat elements including
seasonal ranges, breeding habitat, winter range, and movement corridors; and areas with high relative
population density or species richness. Counties and cities may also designate locally important habitats and
species.

1 observes SJCC 18.30.110(D)²⁵¹ provides a mechanism to remove any ambiguity, initially
2 through a voluntary site visit and subsequently with required field investigations or special
3 reports.

4 In the Board's view, the question is not the definitions but rather how those definitions
5 are used in the CAO's regulatory scheme. One cannot view the definitions in isolation but
6 must relate them to the regulations themselves. It is not a requirement that a definition
7 include adequate standards for appropriate, consistent administration. The GMA requires
8 those standards to be included somewhere in the regulations. Thus, in the *Diehl v. Mason*
9 *County* decision cited by CSA/Taggares, it was not inadequate definitions that led the Board
10 to find noncompliance, it was a lack of standards for administration contained anywhere
11 within the regulations. For example, "The provision in Section D .1.c that 'trees and
12 vegetation shall be retained to the extent feasible,' is not a standard, but merely, as
13 Petitioners noted, an "exhortation to do the right thing'."²⁵² Similarly, "[t]he County clearly
14 erred on failing to provide standards for land division design which 'minimize impacts' to
15 anadromous fisheries and fish habitat."²⁵³

16
17
18 The difficulty the Board faces in analyzing CSA/Taggares' argument is that it fails to
19 relate the definition to its actual use within the regulations. A definition necessarily must be
20 addressed in the specific context of its application. Are there or are there not sufficient
21 standards included within the CAOs to provide administrative guidance? That question has
22 not been addressed. CSA/Taggares' failure to do that is fatal; they are unable to establish
23 violations of RCW 36.70A.060(2) or any of the referenced chapter 365-190 WAC sections in
24 regard to General Issues 1 and 2, Wetlands Issues 2, 3, and 4 and FWHCAs Issues 7 and
25 11.

26
27 The Board finds and concludes that CSA/Taggares have failed to meet their burden
28 of proof to establish violations of RCW 36.70A.060(2) or any of the referenced chapter 365-
29
30
31

32 ²⁵¹ IR 40009.

²⁵² *Diehl v. Mason County*, Case No. 95-2-0073, Compliance Order of March 22, 2000.

²⁵³ *Id.*

1 190 WAC sections in regard to General Issues 1 and 2; Wetlands Issue 4; FWHCA Issues 7
2 and 11.

3
4 **BAS – RCW 36.70A.172**

5 In regard to violations of RCW 36.70A.172, CSA/Taggares argues the “mitigation
6 required” is not supported by BAS, citing *OSF v. Jefferson County*.²⁵⁴ They repeatedly argue
7 the County buffer regulations establish a “universal” or “one-size-fits-all” protection system,
8 which ignores actual site conditions or the impact of a project.²⁵⁵ These Petitioners also
9 weave into their argument the claim that the “environmental servitudes” imposed fail to
10 comply with the RCW 82.02.020 requirements which they argue necessitate addressing
11 “reasonable necessity, nexus and proportionality.”²⁵⁶

12
13 CSA/Taggares also states there is no evidence of the need to “designate all of the
14 marine shorelines under the two-part definitional criteria [of] RCW 36.70A.480 (5) and,
15 therefore, the County has a duty to ‘show its work and to show how in this record the
16 program ... [is] supported by the adopted BAS.’”²⁵⁷ “. . . [T]he absence of evidence
17 supporting the County’s approach speaks volumes.”²⁵⁸

18
19 The County observes it began its CAO process by identifying BAS and adopting the
20 *BAS Synthesis*.²⁵⁹ The County also addresses the *OSF v. Jefferson County* decision and
21 distinguishes it, stating the buffer width imposed by Jefferson County fell outside the range
22 of BAS. It also counters CSA/Taggares’ argument regarding the burden of proof, citing *OSF*
23 *vs. WWGMHB*.²⁶⁰ Finally, the County takes issue with CSA/Taggares’s “one-size-fits-all”
24 argument.
25

26 First of all, the Board does not agree that it is incumbent upon the County to shoulder
27 the burden of proof: that is, to produce BAS evidence “supporting the County’s approach.”
28

29
30 ²⁵⁴ Case No. 08-2-00-29c at 38, 39.

²⁵⁵ Petitioner Common Sense Alliance’s Prehearing Brief at 17.

²⁵⁶ *Id.* at 18; P. J. Taggares Company’s Prehearing Brief *passim*.

²⁵⁷ Petitioner Common Sense Alliance’s Prehearing Brief at 22, 23.

²⁵⁸ *Id.* at 22.

²⁵⁹ The *BAS Synthesis* were adopted by San Juan County Resolution 22-2011 on June 7, 2011.

²⁶⁰ 166 Wn. App. 172 (2012).

1 To the contrary, it is the duty of CSA/Taggares to show the water quality buffers and Tree
2 Protection Zones were not crafted with the inclusion of the best available science.²⁶¹

3 This argument raised by CSA/Taggares mirrors that raised in *Olympic Stewardship*
4 *Found. v. W. Wash. Growth Mgmt. Hearings Bd.*²⁶² As Division II stated:

5 In the Foundation's view, RCW 36.70A.172(1) requires a county to "create a
6 record demonstrating that it engaged in a reasoned process of evaluating
7 the 'best available science' when it develops critical area regulations." . . .
8 the Foundation's argument turns on the meaning of the word "include." The
9 Foundation contends that it is not enough for local governments to merely
10 reference relevant scientific studies during the critical areas regulatory
11 process; rather, local governments must explain how these studies support
12 the adopted critical areas policy or regulation. Accordingly, in this case, the
13 Foundation argues that the Board committed an error of law under RCW
14 36.70A.172(1) without requiring the County to explain how the studies in
the administrative record supported the vegetation regulation.²⁶³

15 One of the conclusions drawn by the Court was stated as follows:

16
17 We do not read *Concerned Friends of Ferry County* as imposing a duty on a
18 county to describe each step of the deliberative process that links the
19 science that it considers to the adopted policy or regulation. Nor does the
20 relevant Department of Commerce regulation impose such a duty—rather, it
21 requires that counties "address . . . on the record . . . [t]he relevant sources of
22 best available scientific information included in the decision-making." WAC
23 365-195-915(1)(b). Here, because the County complied with
this requirement, we conclude that the Board correctly applied RCW
36.70A.172(1).²⁶⁴

24
25 In the matter now before the Board, the County clearly addressed the available
26 sources of BAS included in its decision-making process as required by WAC 365-195-
27 915(1).²⁶⁵ Early on, a document referred to as the *BAS Synthesis* was adopted in June,

28
29 ²⁶¹ RCW 36.70A.172(1).

30 ²⁶² 166 Wn. App. 172.

31 ²⁶³ *Id.* at 188, 189.

32 ²⁶⁴ *Id.* at 194.

²⁶⁵ "(1) To demonstrate that the best available science has been included in the development of critical areas policies and regulations, counties and cities should address each of the following on the record:

(a) The specific policies and development regulations adopted to protect the functions and values of the critical areas at issue.

1 2011. The syntheses were developed subsequent to a review of nearly 2000 books, papers
2 and reports, including many provided to the County in response to the County's request for
3 submittals of science.²⁶⁶ The record documents the Planning Commission and County
4 Council held meetings to review the *Synthesis* document prior to its approval.²⁶⁷ Thereafter,
5 both the Commission and Council met and discussed how regulations might be amended in
6 consideration of the BAS.²⁶⁸ Numerous reports were prepared which included the proposed
7 regulations, and options, with the reports being referenced as the "CA science review".²⁶⁹
8 The ordinances also provide summaries of the BAS consideration:
9

10 Ordinance 26-2012, background paragraphs C and D:

11 C. The applicable science related to critical areas was reviewed and is
12 summarized in the *Best Available Science Synthesis for San Juan County,*
13 *May 2011*, adopted in Resolution 22-2011.

14 D. Additional review of the County's General regulations for critical areas
15 was undertaken and is described in the document "Review and
16 Recommendations on SJCC 18.3 0.110-General Regulations Applicable to
17 all Critical Area Types", dated June 2, 2011. This review was discussed and
18 public comment heard at a County Council workshop held on June 13,
19 2011.

20 Ordinance 28-2012, background paragraphs D and E:
21

22 (b) The relevant sources of best available scientific information included in the decision-making.
23 (c) Any nonscientific information—including legal, social, cultural, economic, and political information—used as
24 a basis for critical area policies and regulations that depart from recommendations derived from the best
25 available science. A county or city departing from science-based recommendations should:
26 (i) Identify the information in the record that supports its decision to depart from science-based
27 recommendations;
28 (ii) Explain its rationale for departing from science-based recommendations; and
29 (iii) Identify potential risks to the functions and values of the critical area or areas at issue and any additional
30 measures chosen to limit such risks. State Environmental Policy Act (SEPA) review often provides an
31 opportunity to establish and publish the record of this assessment.
32 (2) Counties and cities should include the best available science in determining whether to grant applications
for administrative variances and exemptions from generally applicable provisions in policies and development
regulations adopted to protect the functions and values of critical areas. Counties and cities should adopt
procedures and criteria to ensure that the best available science is included in every review of an application
for an administrative variance or exemption."

²⁶⁶ IR 45001-02.

²⁶⁷ IR 36003-04, IR3006-07, IR 36015-16.

²⁶⁸ IR 36035-37.

²⁶⁹ IR 90613-63, IR 110801-34, IR 75105-10, IR 90664-90, IR 25028-37, IR 25020-27.

1 D. The applicable science related to Wetlands and stormwater management
2 was reviewed, and is summarized in the *Best Available Science Synthesis*
3 *for San Juan County, May 2011 (BAS Synthesis)*, which was adopted in
4 Resolution 22-2011.

5 E. Additional review of the County's critical areas regulations was
6 undertaken and is described in the documents "Analysis of Existing San
7 Juan County Regulations Pertaining to Wetlands" prepared by Dr. Paul
8 Adamus, and letters provided by the Washington State Department of
9 Ecology on June 9, 2011 and September 14, 2011. The review was
10 discussed and public comment heard at a County Council workshop held on
11 June 13 and 14, 2011.

12 Ordinance 29-2012, background paragraphs E, F and G:

13 E. The applicable science related to FWHCAs and stormwater management
14 was reviewed, and is summarized in the *Best Available Science Synthesis*
15 *for San Juan County, May 2011 (BAS Synthesis)*, which was adopted, along
16 with the underlying scientific literature, and Resolution 22-2011.

17 F. The recommendations of the San Juan Initiative Policy Group, which
18 included 11 citizens appointed by the County Council, were considered in
19 the development of these amendments.

20 G. Additional review of the County's critical areas regulations was
21 undertaken and is described in the documents "Analysis of Existing San
22 Juan County Regulations Pertaining to Steams (sic) and Other Upland Fish
23 and Wildlife Habitat Conservation Areas, May 31, 2011" prepared by Dr.
24 Paul Adamus, and "Analysis of Existing San Juan County Regulations,
25 Marine FWHCAs, May 31, 2011" prepared by the Watershed Company and
26 County staff. Meetings and workshops on this analysis were held on June
27 14, August 16, and September 12, 2011. Based on this analysis and public
28 testimony, the County Council provided guidance on the draft amendments.

29 The Board can reach no conclusion other than the County complied with RCW
30 36.70A.172 and WAC 365-195-915(1) by "including" BAS. The County clearly addressed,
31 on the record, the relevant sources of BAS and included those in its decision-making.
32 Whether or not the County's ultimate decisions fall within the range of the BAS or,
alternatively, whether the County provided adequate justification for departure from BAS,
are separate questions.

1 CSA/Taggares' argument that the regulations constitute a "one-size-fits-all" approach
2 is belied by an analysis of the regulations themselves.²⁷⁰ First of all, wetlands are rated as to
3 whether they are of high, medium, or low sensitivity to water quality impacts. Additionally,
4 they are rated on their sensitivity to impacts on plants and animals, again using either a
5 high, medium or low sensitivity rating.²⁷¹ Some wetlands of medium and low habitat
6 importance are exempted from the regulations.²⁷²

8 Actual determination of buffer width is ascertained "based on the characteristics of
9 the site and the proposed development, vegetation removal or other site modifications" and
10 whether runoff water is primarily on the surface or below ground.²⁷³ That site specific
11 analysis includes, among other considerations, a Storm Water Discharge Factor which
12 takes into account vegetation, soils and permeability.²⁷⁴

13 FWHCAs are also subject to the water quality buffer analysis.²⁷⁵ Tree Protection
14 Zone size determination takes into account the type of water body.²⁷⁶ TPZs are also subject
15 to adjustments based on the existence of public roads. Private roads are considered subject
16 to design, runoff flow, traffic and tree canopy coverage.²⁷⁷ The Board finds and concludes
17 the water quality buffers and Tree Protection Zones are indeed site specific; they are not
18 subject to a "universal" width. Actual site conditions and the impacts are clearly taken into
19 consideration.
20

21 The Board finds and concludes that CSA/Taggares have failed to meet their burden
22 of proof to establish violations of RCW 36.70A.172 or any of the referenced chapter 365-
23 195 WAC sections in regard to General Issues 5 and 6, and FWHCAs Issues 7 and 11.
24

25 The Board has already clarified and determined it has no jurisdiction to determine
26 violations of RCW 82.02.020. Thus, the Board will not address CSA/Taggares' arguments
27

28 ²⁷⁰ Interestingly, CSA/Taggares acknowledges the critical area protection program is "somewhat project
29 specific". See Petitioner Common Sense Alliance's Prehearing Brief at 19.

30 ²⁷¹ SJCC 18.30.150C, IR 40095-40096.

31 ²⁷² SJCC 18.30.150D, IR 40097.

32 ²⁷³ SJCC 18.30.150E1, IR 40100.

²⁷⁴ SJCC 18.30.150E1, Step 4, IR 40100-40103.

²⁷⁵ SJCC 18.30.160E1, IR 40134-40135.

²⁷⁶ *Id.* at Table 3.9, IR 40138.

²⁷⁷ SJCC 18.30.160E1, Step 6, IR 40138.

1 regarding "reasonable necessity, nexus and proportionality" other than to observe the fact
2 that buffer widths and TPZs are subject to site specific considerations.

3 4 **Property Rights**

5 CSA/Taggares allege provisions of Ordinances 26-2012, 28-2012 and 29-2012 are
6 "arbitrary and discriminatory and otherwise fail to comply with the requirements of RCW
7 36.70A.020(6), property rights, and the codified equivalent, RCW 82.02.020", that a failure
8 to assure property rights are protected violates "... the governing principles set forth at
9 WAC173-26-186(5) ..." and that the County failed to "... require demonstration of nexus,
10 proportionality and reasonable necessity ... before the imposition of environmental
11 servitudes" ²⁷⁸ As previously acknowledged, the Board will consider only the allegation
12 of GMA Goal 6, RCW 36.70A.020(6), which provides:
13
14

15 ²⁷⁸ An example of the CSA/Taggares property rights allegations is General Issue 2: "Whether the following
16 terms set forth in Section 2, SJCC 18.20.010 ("A" definitions) through Section 20, SJCC 18.20.230 ("W"
17 Definitions) in Ordinance 26-2012 are arbitrary and discriminatory and otherwise failed to comply with the
18 requirements of RCW 36.70A.020(6), property rights, and the codified equivalent, RCW 82.02.020:

19 As written the following definitions fail to meet the minimum standards for the proper
20 application of mitigating conditions to a private property as a universal condition and as such
21 violate legally protected rights, and are arbitrary and discriminatory and violative of procedural
22 requirements established by the Courts in *Nollan v. California Coastal Comm.*, 483 U.S. 825, 107
23 S. Ct. 3141, 97 L. Ed. 2d. 677 (1987), *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129
24 L. Ed. 2d 304 (1994), and *Isla Verde v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002) and
25 specifically including RCW 82.02.020. As the consequence of the County's failure, application of
26 the provisions cause reasonable people (and courts) to guess at the meaning and proper
27 application in given circumstances; and are therefore unenforceable to protect critical areas as
28 used in combination with the wetland and fish and wildlife habitat conservation ordinance.

29 'Adaptive management'
30 'Buffer zone, strip, or area'
31 'Critical area functions and values'
32 'Development'
'Development area'
'No net loss'
'Primary association'
'Tree Protection Zone"'

31 P.J. Taggares Company adopts the statements above as applied to the Taggares properties on Blakely
32 Island, including the Triplex, the Platted Lots facing the bay at the north end of the island, and the wooded but
developed peninsula at the north end of the island as described in the record.

Other issues raising similar challenges are: General Issue 4, Wetlands Issues 6 and 7, FWHCA Issues 9
and 10.

1 Property rights. Private property shall not be taken for public use without just
2 compensation having been made. The property rights of landowners shall
3 be protected from arbitrary and discriminatory actions.

4 CSA/Taggares argues the County failed to properly consider “constitutional and
5 statutory rights” of property owners and they assert the adopted CAOs are arbitrary and
6 discriminatory as to specific properties.²⁷⁹ They iterate the argument that all properties “get
7 the same treatment” under the Wetlands and FWHCAs ordinances regardless of site-
8 specific circumstances, restating the argument the County adopted a “universal” approach
9 to buffer sizing for both wetlands and FWHCAs. These Petitioners go further by arguing the
10 burden is on the County to establish the “environmental servitudes” are reasonably
11 necessary.²⁸⁰

12
13 As the Board stated in *Weyerhaeuser Company v. Thurston County*²⁸¹ “although
14 Goal 6 opens with a statement related to the unconstitutional taking of property, [the Growth
15 Board] has no authority to determine constitutional issues.” In order for CSA/Taggares to
16 prevail in its Goal 6 challenge, they must prove the action taken by the County in the
17 adoption of some of its CAO regulations is both arbitrary and discriminatory; showing only
18 one is insufficient to overcome the presumption of validity accorded to local jurisdictions by
19 the GMA.²⁸² Additionally, CSA/Taggares must show the action has impacted a legally
20 recognized right.²⁸³

21
22 First of all, the burden is on the Petitioners to establish the CAOs are both arbitrary
23 and discriminatory. While a jurisdiction may have a different burden of proof when imposing
24 conditions on a specific project that is not the case in the matter before us.

25
26 Here, these Petitioners have done a masterful job of attempting to steer the Board
27 into a constitutional thicket by interweaving the questions of nexus, proportionality, and
28

29
30 ²⁷⁹ Petitioner Common Sense Alliance’s Prehearing Brief at 34.

31 ²⁸⁰ *Id.* at 35, 36: “. . . local governments are required to make a finding that such environmental servitude is a
reasonable necessity under the site conditions present.”

32 ²⁸¹ Case No. 10-2-0020c, Amended FDO at 56 (6/17/11).

²⁸² *Skagit D06, LLC v. City of Mount Vernon*, Case No. 10-2-0011, FDO at 15 (August 4, 2010).

²⁸³ *Pt. Roberts Registered Voters Assoc. v. Whatcom County*, WWGMHB Case No. 00-2-0052 at 4 (FDO, April
6, 2001) (citing *Achen v. Clark County*, WWGMHB Case No. 95-2-0067 (FDO, Sept. 20, 1995)).

1 reasonable necessity into its Goal 6 claims. However, the Board cannot follow
2 CSA/Taggares' lead.

3 As discussed above, the Board has rejected the assertions of CSA/Taggares that the
4 County's approach to buffer sizing is a "universal" or a "one-size-fits-all" methodology.
5 Contrary to these Petitioners' arguments, the ordinances take into account the specific
6 nature of a shoreline or wetland and the various factors affecting their protection. As the
7 court stated in *McNaughton v. Boeing*:

9 Arbitrary and capricious action of administrative bodies means willful and
10 unreasoning action, without consideration and in disregard of facts or
11 circumstances. Where there is room for two opinions, action is not arbitrary
12 or capricious when exercised honestly and upon due consideration, even
13 though it may be believed that an erroneous conclusion has been
reached.²⁸⁴

14 The Board has also addressed what constitutes an arbitrary decision. In
15 *Fleischmann's Industrial Park, LLC v. City of Sumner*, the Board stated that an arbitrary
16 decision is one that is not merely an error in judgment but is "baseless" and "in disregard of
17 the facts and circumstances."²⁸⁵ In this matter the Board cannot conclude the action of the
18 San Juan County Council was "willful and unreasoning", that its decision was without
19 consideration and in disregard of the facts or circumstances. In fact, there is room for many
20 opinions as to the appropriate methodology for protection of wetlands and FWHCAs. The
21 Board finds and concludes that CSA/Taggares have failed to meet their burden of proof to
22 establish any violations of RCW 36.70A.020(6). Having made that determination, there is no
23 need to address the issue of possible discriminatory action.
24
25

26 The Board finds and concludes that CSA/Taggares have failed to meet their burden
27 of proof to establish violations of RCW 36.70A.020(6) in regard to General Issue 4,
28 Wetlands Issues 6 and 7 and FWHCAs Issues 9 and 10.
29
30
31
32

²⁸⁴ 68 Wn. 2d 659, 663, quoting *Lillions v. Gibbs*, 47 Wn. 2d 629, 633-34.

²⁸⁵ GMHB Case No. 11-3-0001, FDO at 27.

1 **SEPA**

2 Wright's Issue 4 is the only issue alleging a violation of the State Environmental
3 Policy Act (SEPA). Specifically, that issue states:

4
5 **Issue 4:**

6 Does the Determination of Non-significance (DNS) for each CAO Ordinance
7 fail to meet the requirement of WAC 197-11-340(2)(a)(v) and the Guidelines
8 for local governments as directed by RCW 43.21C.030(c):

9 1.Failure to comply with SEPA during the consideration of non-project action
10 such as a development regulation are grounds for voiding the action (*Lassila*
11 *v. Wenatchee*, 899 Wn.2d 804, 576 P.2d 54 (1078)). The Respondent has
12 made numerous changes and additions to the various ordinances
13 subsequent to the issuance of DNS for the CAO ordinances, therefore,
SEPA guidelines have not been met.²⁸⁶

14 The County raises numerous arguments as to why Issue 4 should be dismissed.
15 While some or all of those arguments may support dismissal, the County's assertions that
16 Wright lacks participation standing to raise a SEPA challenge and that any such challenges
17 are barred by WAC 197-11-545 (2) are fatal to Wright's claim.²⁸⁷

18 The County alleges there is no evidence in the record to establish that Wright
19 provided any comment regarding any of the DNS determinations. The record indicates that
20 SEPA notices were published regarding each of the challenged ordinances, followed by
21 comment periods of 14 days. Although Wright provided both oral and written comments
22 regarding the challenged ordinances themselves, there is no evidence of any comments
23 challenging the DNS determinations. Wright does not dispute the fact he failed to provide
24 SEPA comments. His Petition for Review only asserted participation standing. Neither did
25 he later allege he has APA standing to raise a SEPA challenge, let alone assert he has met
26 the two part requirements to establish APA standing: zone of interests or injury-in-fact.
27
28
29

30 ²⁸⁶ The Board notes Wright's Issue 4 was amended in his Amended Petition for Review and again in his
31 Restatement of Issue Number 4. Some of the versions included allegations involving all of the challenged
32 ordinances. The analysis of Issue 4 will address the SEPA challenges in regard to all four of the CAO
ordinances.

²⁸⁷ Wright only asserted GMA participation standing in his PFR. There was no allegation he had APA
standing. See Wright PFR at 4.

1 Rather, he simply asserts he has participation standing under the GMA, stating he offered
2 "letters generally related to his concerns arising from the Critical Area Ordinances, or the
3 matter on which review has now been requested."²⁸⁸

4 Participation standing under the GMA is governed by RCW 36.70A.280(2)(b) which
5 states a petition for review may be filed only by a person who has participated orally or in
6 writing before the county or city regarding the matter on which a review is being requested.
7 Wright lacks such standing due to his failure to provide SEPA comment. There is no
8 evidence whatsoever establishing he submitted oral or written comment raising concerns
9 regarding the SEPA process. To meet the participation standing test requires a challenger
10 to have provided pertinent, specific comment to the SEPA lead agency.
11

12 Furthermore, the SEPA rules at WAC 197-11-545 set forth the ramifications of a
13 failure to provide such comment:

14 WAC 197-11-545 (2) Other agencies and the public.

15
16 Lack of comment by other agencies or members of the public on
17 environmental documents, within the time periods specified by these rules,
18 shall be construed as lack of objection to the environmental analysis, if the
19 requirements of WAC 197-11-510 are met.²⁸⁹

20 The Board finds and concludes Wright has failed to meet his burden of proof to
21 establish violations of chapter 43.21C RCW or the underlying WACs in regard to his Issue 4.

22 Invalidity

23
24 CSA/Taggares, the Friends and the Builders ask the Board to impose invalidity.²⁹⁰
25 Invalidity is authorized only after the Board has made a finding of non-compliance and is
26 based on a determination the challenged action, in whole or in part, would substantially
27

28
29
30 ²⁸⁸ Reply Brief of William H. Wright at 4.

31 ²⁸⁹ WAC 197-11-510 sets forth the requirements for provision of public notice. There is no allegation the
County failed to provide appropriate notice.

32 ²⁹⁰ Petitioner Friends of the San Juans' Prehearing Brief at 51, referencing Friends' issues General 14
(referenced as Issue 49 in its brief), GHA & FFA 6 (issue 50), Wetlands 13 (issue 51) and FWHCA 19 (issue
52);Petitioner Common Sense Alliance's Prehearing Brief at 44; P. J. Taggares Company's Prehearing Brief at
24; Prehearing Brief, San Juan Builders, at 5.

1 interfere with the fulfillment of the goals of the GMA.²⁹¹ While areas of GMA non-compliance
2 have been found, none of the parties was able to establish the ordinances would
3 substantially interfere with GMA goal fulfillment. That is particularly true in light of San Juan
4 County Ordinance No. 3-2013 which extended the effective date of all four challenged
5 ordinances until March 1, 2014. The Board declines to impose invalidity.
6

7 8 **VI. CONCLUSION OF LEGAL ISSUES**

9 1. The Board dismissed the following issues:

10 CSA/Taggares: Ordinance 28-2012 (Wetlands) Issues 1, 2, and 3

11 Ordinance 29-2012 (FWHCAs) Issues 1, 2, 3, 4, 5, and 6

12 Friends: Ordinance 26-2012 (General) Issues 1 and 2

13 Ordinance 27-2012 (GHA/FFA) Issue 1

14 Ordinance 28-2012 (Wetlands) Issue 1

15 Ordinance 29-2012 (FWHCAs) Issue 1

16 Wright Issues 1, 2, and 3 as they constituted challenges to Findings and
17 Background paragraphs of the CAO's;
18

19 2. The Board dismissed all allegations of RCW 36.70A.040(3) and RCW 36.70A.140 20 violations based on the inapplicability of those statutes;

21 3. The Board dismissed all allegations of constitutional violations and violations of 22 RCW 82.02.020 or WAC 173-26-186 based on a lack of jurisdiction;

23 4. The Board dismissed CSA/Taggares challenges of violations resulting from words 24 and phrases included in General Issues 1 and 2 other than "primary association" 25 based on these Petitioners' acknowledgment of abandonment; 26

27 5. The Board dismissed CSA/Taggares' Wetlands Issue 1 due to their 28 acknowledgment of abandonment; 29

30 6. The Board dismissed Wright's Issue 6 due to abandonment;

31 7. The Board found and concluded Wright failed to satisfy his burden of proof as to 32 Issue 5;

²⁹¹ RCW 36.70A.302(1).

- 1 8. The Board found and concluded CSA/Taggares failed to satisfy their burden of
2 proof as to the following issues: General Issue 8, Wetlands Issue 5, and FWHCAs
3 Issue 8;
4
5 9. The Board found and concluded the Friends failed to satisfy its burden of proof as
6 to the following issues: 9 (General 5), 11 (General 7), 12 (General 10), 13
7 (Wetlands 7), 14 (FWHCA 8), 15 (General 11), 16 (GHA/FFA 2), 17 (GHA/FFA
8 3), 18 (Wetlands 8), 19 (FWHCA 3), 20 (FWHCA 10), 21 (FWHCA 12), 22 (FWHCA
9 13), 23 (FWHCA 14), 24 (FWHCA 15), 27 (FWHCA 4), 28 (FWHCA 6), 29 (FWHCA
10 9), 30 (FWHCA 2), 32 (General 4, other than in regard to SJCC 18.30.110.C.3), 33
11 (General 8), 34 (Wetlands 2), 35 (Wetlands 5), 36 (FWHCA 5), 37 (Wetlands 6)
12 and Issue 38 (FWHCA 7), with the exceptions address below, 41 (General 13),
13 42 (GHA/FFA 14), 43 (Wetlands 9), 44 (FWHCA 11), 45 (General 12), 46 (GHA/FFA
14 5), 47 (Wetlands 11), and 48 (FWHCA 17);
15
16 10. The Board found and concluded the Builders failed to satisfy its burden of proof
17 to establish GMA violations as to Issues 1, 2, 3, and 4;
18
19 11. The Board found and concluded the Friends failed to meet its burden of proof to
20 establish any of the regulations violated the consistency requirements of RCW
21 36.70A.130;
22
23 12. The Board found and concluded CSA/Taggares failed to meet their burden of to
24 establish any of the regulations violated the consistency requirements of RCW
25 36.70A.130 in regard to Wetlands Issue 4 and FWHCAs Issues 7 and 11;
26
27 13. The Board found and concluded the Friends satisfied its burden of proof, and the
28 Board found GMA non-compliance, as to the following issues:
29 Issue 8 (General 3) as to the definition of "development"
30 Issue 10 (General 6)
31 Issue 25 (Wetlands 3)
32 Issue 26 (Wetlands 4)
Issue 27 (FWHCA 4)

1 Issue 32 (General 4) as to transmission and utility lines

2 Issue 39 (Wetlands 10)

3 Issue 40 (FWHCA 16)

4 14. In Issues 37 and 38 the Friends challenged numerous "exemptions" to CAO
5 application. The Board found the Friends had failed to meet their burden of proof
6 in regard to all challenges other than the following: The County's action in
7 exempting new and expanding agricultural activities, Exemption f (wetlands) and
8 Exemption g (FWHCAs), violated RCW 36.70A.060 and RCW 36.70A.172. The
9 Board further found and concluded the County's actions were not guided by Goal
10 9 and 10.
11

12 15. The Board found the County's action in the allowance of sewage disposal
13 systems within wetlands, FWHCAs, or their buffers violated RCW 36.70A.060 and
14 RCW 36.70A.172. The Board further found and concluded the County's actions
15 were not guided by Goal 9 and 10.
16

17 **VII. ORDER**

18 Based upon review of the Petitions for Review, the briefs and exhibits submitted by
19 the parties, the GMA, the SEPA, prior Board orders and case law, having considered the
20 arguments of the parties and having deliberated on the matter, the Board ORDERS:
21

- 22 1. The County's allowance of new and expanding agricultural activities in wetlands
23 and their buffers and in FWHCA buffers as well as the allowance of sewage
24 disposal systems in wetlands, FWHCAs and their buffers does not comply with
25 RCW 36.70A.060 and RCW 36.70A.172, and such actions were not guided by
26 RCW 36.70A.020(9) and (10). Ordinances 28-2012 and 29-2012. Friends Issues
27 37 (Wetlands 6) and 38 (FWHCA 7);
28
29 2. The County's exemption for transmission and utility lines within private or public
30 rights of way authorized by SJCC 18.30.110.C.3 does not comply with RCW
31 36.70A.060 and RCW 36.70A.172, and such action was not guided by RCW
32 36.70A.020(9) and (10). Ordinance 26-2012. Friends' Issue 32 (General 4);

- 1 3. The County's definition of "development" in Ordinance 26-2012 does not comply
2 with RCW 36.70A.060 and RCW 36.70A.172, and such action was not guided by
3 RCW 36.70A.020(9) and (10). Friends Issue 8 (General 3);
- 4 4. The County's public agency and public/private utility exception included in
5 Ordinance 26-2012 does not comply with RCW 36.70A.060 and RCW
6 36.70A.172, and such action was not guided by RCW 36.70A.020(9) and (10).
7 Friends Issue 10 (General 6);
- 8 5. San Juan County's Findings of Fact relating to water quality buffers and habitat
9 buffers are not supported by substantial scientific evidence in the record;
- 10 6. San Juan County's water quality buffer widths and habitat buffer widths adopted
11 in Ordinance Nos. 28-2012 and 29-2012 fall outside of the range for buffer widths
12 recommended by the Best Available Science, without any reasoned justification;
- 13 7. San Juan County's water quality buffers and habitat buffers adopted in Ordinance
14 Nos. 28-2012 and 29-2012 fail to protect the functions and values of Critical Areas
15 comprised of wetland ecosystems and fish and wildlife ecosystems;
- 16 8. The County's water quality buffer and habitat buffer methodologies combined with
17 the lack of monitoring and an adaptive management program fail to protect
18 Critical Areas from degradation and do not comply with RCW 36.70A.060 and
19 RCW 36.70A.172, as more specifically addressed in the body of this order and
20 such actions were not guided by RCW 36.70A.020(9) and (10). Ordinances 28-
21 2012 and 29-2012. Friends' Issues 25 (Wetlands 3), 26 (Wetlands 4), 39
22 (Wetlands 10) and 40 (FWHCA 16);
- 23 9. In adopting Ordinance Nos. 28-2012 and 29-2012, as more specifically addressed
24 in the body of this order, San Juan County failed to include the Best Available
25 Science in developing policies and development regulations to protect the
26 functions and values of critical area ecosystems and the County failed to provide
27 a reasoned justification for departing from the Best Available Science;
- 28
29
30
31
32

- 1 10. In regard to all other issues, the petitioners either abandoned the same or the
2 Board found and concluded the petitioner had failed to meet his/its burden of
3 proof. All such issues are dismissed;
4 11. The Board remands San Juan County Ordinances 26-2012, 28-2012 and 29-2012
5 for the County to take legislative action to comply with the requirements of the
6 GMA as set forth in this order and declines to issue a determination of invalidity.
7

8 The Board sets the following schedule for the County's compliance:
9

Item	Date Due
Compliance Due	March 5, 2014
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	March 19, 2014
Objections to a Finding of Compliance	April 2, 2014
Response to Objections	April 14, 2014
Compliance Hearing Location to be determined	April 24, 2014

10
11
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14
15
16
17 Dated this 6th day of September, 2013.
18
19

20 _____
William Roehl, Board Member
21
22

23 _____
Nina Carter, Board Member
24
25

26 _____
Raymond L. Paoella, Board Member
27

28 **Note: This is a final decision and order of the Growth Management Hearings Board**
29 **issued pursuant to RCW 36.70A.300.**²⁹²

30 ²⁹² Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all
31 parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840.
32 A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days
as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent
upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings
Board is not authorized to provide legal advice.